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TORTS

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TORTS

CASEBOOK EDITION keyed to
Prosser, Wade & Schwartz,
***Torts* (6th Ed. 1976)**

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Abbreviations used in text

G,K&E — Gregory, Kalven & Epstein, *Cases and Materials on Torts* (Little, Brown, 3rd Ed., 1977)

K&K — Keeton & Keeton, *Cases and Materials on the Law of Torts* (West, 2d Ed., 1977)

Nutshell — Edward Kionka, *Torts in a Nutshell; Injuries to Persons and Property* (West, 1977)

Pr. L. Nut. — Noel & Phillips, *Products Liability in a Nutshell* (West 1974)

Rest. 2d — American Law Institute, *Restatement Second of Torts* (Tent. Drafts 1963-77)

Prosser — *Handbook of the Law of Torts* (West, 4th Ed., 1971)

P,W&S — Prosser, Wade & Schwartz, *Cases and Materials on Torts* (Foundation Press, 6th Ed., 1976)

PREFACE

This book includes analyses of the facts and holdings of virtually all of the cases treated as principal cases in Prosser, Wade & Schwartz, *Cases and Materials on Torts* (6th Ed. 1976), except for cases in the casebook chapter entitled "Major Statutory Modifications . . ." Our analysis of each Prosser case is preceded by a ★ symbol.

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INTRODUCTION

I. NATURE OF TORT LAW

A. No satisfactory definition: There is no really useful definition of a "tort" which will allow all tortious conduct to be distinguished from all non-tortious conduct. In fact, courts are constantly changing their view of what constitutes tortious conduct (usually by way of ***expansion*** of liability). The best that can be done is to identify a few of the main features and purposes of tort law:

1. **Not contractual:** Tort law, unlike contract law, is not based on the idea of ***"consent"***. Whereas a contract is an expression of the parties' consent to be bound, every member of society will be liable in tort if he behaves in certain ways, whether he has consented to such liability or not. Thus an automobile driver who drives carelessly will be liable in tort to one he hits, regardless of consent.

2. **Compensation:** The overall purpose of tort law is to ***compensate*** plaintiffs for ***unreasonable harm*** which they have sustained.

   a. **Societal standard:** The unreasonableness of the harm is generally measured from a broad ***"social utility"*** standpoint. For instance, in determining whether the defendant's conduct is "negligent", the social utility of that conduct (e.g. running a railroad) plays an extremely important role.

3. **Shifting of burden:** A corollary of tort law's interest in making compensation is that where financial hardship must fall on someone, the courts will attempt to place it on the party who can best bear it (usually because he is, or could easily have been, covered by ***insurance***).

   a. **Not dispositive:** The parties' relative ability to bear the burden is not dispositive; a workingman who dashes out into the street and is hit by a U.S. Mail Truck will usually not be able to recover from the U.S. (because of his "contributory negligence"), even though he is obviously far less able to bear the financial burdens of his injury than would the U.S. government. But ability to bear the burden is certainly one important factor in courts' decisions; this is seen most clearly in cases of "products liability", in which manufacturers and other sellers of defective products are required to bear the cost of injuries caused by these products, regardless of negligence, on the theory that such costs should be treated as simply part of the "cost of doing business". See *infra*, p. 251.

II. CATEGORIES OF TORTS

A. Three types of defendant conduct: Most Torts courses and casebooks organize the bulk of tort law into three categories, relating to the nature of the ***defendant's***

conduct. This is also the approach followed here. Thus we consider, in order: (1) ***intentional*** torts; (2) the tort of ***"negligence"*** (i.e., roughly speaking, "carelessness"); and (3) torts in which the defendant's conduct is neither intentional nor careless, but he is made ***"strictly liable"*** because of the nature of his activity (e.g., abnormally dangerous activity, manufacture of defective products, etc.)

B. Historical overview: The relations among these three categories have undergone vast historical development.

1. **Early strict liability:** Under early common-law (15th century), courts often ★ imposed ***strict liability***. Thus in *Anonymous* (K.B. 1466), it was stated that " . . . if a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others." For instance, as that case stated, if A lifted his stick to defend himself against an attack by B, and the stick accidentally hit C, standing behind A, A would be liable, notwithstanding his carefulness, and the fact that he was engaged in lawful self-defense.

   a. **Trespass vs. trespass on the case:** A distinction developed between the action of ***"trespass"*** (which was for a ***direct invasion*** of the plaintiff's person or property) and ***"trespass on the case"*** (which was for an indirect invasion of these interests). A classic example was that of a log which falls on the road; if the log hit the plaintiff while he was walking, this was trespass. But if he stumbled on the log after if had landed, this was merely trespass on the case.

   b. **Significance of distinction:** One important consequence of the distinction between the two causes of action is that for trespass, strict liability existed (as in *Anonymous*, *supra*). For trespass on the case, however, it was normally necessary to show some fault on the defendant's part.

2. **Negligence for trespass:** But the rule of strict liability for "trespass" began to ★ break down, with respect to certain kinds of trespasses. Thus in *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616), P and D were soldiers engaged in military exercises. As they were skirmishing, D's musket went off, wounding P. The court held for P, but noted that if D had been able to show that the accident was "utterly without his fault", as would be the case if P had run in front of the gun at the moment of firing, D would not be liable. The burden of proving pure accident was upon D, however, and he did not make such a showing.

3. **Shift of burden of proof to plaintiff:** Still later, courts began to hold not only that the defendant in a "trespass" case was not liable if he was completely without fault, but also that the ***burden of proving fault*** should be on the ***plaintiff***.

   ★ ***Example:*** Two dogs, owned by P and D, are fighting. D, attempting to separate them, raises his stick over his shoulder, hitting P in the eye. *Held*, " . . . if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable . . . Want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it." *Brown v. Kendall*, 60 Mass. 292 (Mass. 1850).

a. **Meaning of "negligent":** The courts came to adopt a more-or-less "moral" standard of negligence, by which the defendant would be held to have failed to use due care only if his conduct was somewhat blameworthy. For instance, where D was the driver of a car containing P and others, and he fainted at the wheel, causing a crash, it was held that he had not been negligent. Notwithstanding the fact that D had obviously failed to control the car, he was exculpated, because he had had no advance warning of the
★ fainting spell, and therefore no opportunity to stop driving. *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933).

4. **Return of strict liability:** But in recent decades, courts have made a sweeping return to the principle of strict liability, in many areas. Chief among these are where the defendant engages in an ***abnormally dangerous activity*** (*infra*, p. 252), and where he makes or sells a ***defective product*** that causes physical injury (*infra*, p. 259).

★ ***Example:*** D, a contractor building a tunnel for the City of New York, uses dynamite to set off large blasts near a garage owned by P. The garage is wrecked, and P sues. There is no evidence that D failed to use ordinary care in doing the blasting. *Held*, for P. It is irrelevant that the damage to P's property was done not by the direct impact of rocks or other materials, but by concussion or shock waves. Strict liability for all blasting damage will not block the building of towns and other progress; P is not trying to stop the tunnel, but merely to obtain compensation. A previous case allowing strict liability only where the damage is caused directly by rocks is overruled. *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969).

Note: The earlier case referred to in *Spano*, allowing strict liability only where the damage was directly caused by rocks, was a product of the traditional distinction between trespass and trespass on the case. Where the damage was caused by rock, the suit could be brought in trespass; where shock waves were the cause, the damage was considered to be indirect, and trespass on the case (for which negligence was always required) had to be the basis of the suit. The *Spano* decision reflects the final death, at least in New York, of the distinction between the two kinds of action.

C. **Combined torts:** Our analysis of liability founded on the three major types of defendant conduct (intent, negligence, strict liability) goes through p. 298 *infra*. After that, a number of torts are treated which may be based upon more than one of these three types of defendant conduct. For instance, the torts of nuisance and misrepresentation may be founded on either intent, negligence, or strict liability; the same is true for a manufacturer's or retailer's sale of a defective product.

1. **Significance of distinction:** The distinction among these three major types of defendant conduct is most significant, apart from the basic question of liability, with respect to two issues:

a. **Scope of liability:** First, if the defendant's conduct produces ***far-***

reaching, unexpected, consequences, will he be liable for these consequences? In general, ***the more culpable his conduct, the more far-reaching his liability*** for unexpected consequences. Liability for intentional torts, for instance, extends significantly further than that for the tort of negligence; see *infra*, p. 9.

a. **Damages:** Secondly, what ***measure of damages*** must the defendant pay once he is found liable? For all torts, he must pay "compensatory damages", i.e., damages whose purpose is to repay the plaintiff for the harm he has suffered. (Obviously, this objective is virtually never realized in cases of personal injury; can $100,000 really repay the plaintiff for loss of an arm?)

i. **Punitive and nominal damages:** But in intentional tort cases, the plaintiff may also sometimes obtain ***"punitive damages"*** and ***"nominal damages"***, both of which are discussed *infra*, p. 8. Punitive and nominal damages are almost never recoverable where negligence or strict liability is the basis for recovery.

D. **Analyzing tort problems:** The student should analyze a tort problem by considering three major questions about each possible tort:

1. Are the basic requirements (the "*prima facie* case") for the tort satisfied?

2. Are there any ***defenses*** or justifications which the defendant can raise that would prevent him from being liable (e.g., self-defense as a defense to a claim of assault, or contributory negligence as a defense to a claim of negligence)?

3. If the *prima facie* case has been established, and there are no defenses, what elements of ***damages*** may the plaintiff recover (e.g., medical expenses, lost income, pain and suffering, punitive damages, etc.)?

III. SOURCES OF LAW

A. **Restatement as source of law:** In addition to cases and treatises, the principal source for the black-letter rules stated in this outline is the very influential ***Second Restatement of Torts***, drafted by the American Law Institute. Although only about the first two-thirds of the Second Restatement has been published in final form, the remainder has been published in "Tentative Drafts", and citations to the entire work are made heavily throughout this outline. The principal forces behind the Restatement have been its two Reporters: Dean Prosser, and his successor after 1970, Professor Wade.

B. **Term "plaintiff's decedent" not used:** Many of the cases discussed in this outline are ones in which a death resulted, and in which the tort claim was brought by the executor or administrator of the dead person's estate. In this situation, it is the executor or administrator who is actually the "plaintiff", and the dead person is called the ***"plaintiff's decedent"***. However, for purposes of simplicity, the cases are discussed here as if the dead person were the plaintiff, and the term "plaintiff's decedent" is not used.

INTENTIONAL TORTS AGAINST THE PERSON

Introductory Note: This chapter is concerned with intentional torts against people, as distinguished from property. It includes the torts of battery, assault, false imprisonment, and infliction of mental distress. All of these torts are defined in such a way that they must be committed "intentionally", a word whose meaning is discussed immediately below. However, in later chapters, we will consider non-intentional torts related to some of the torts discussed in this chapter. For instance, we will consider the tort of *negligent* infliction of mental distress *infra*, p. 164.

I. "INTENT" DEFINED

A. **Intent generally:** What exactly must a tortfeasor intend to do in order for him to commit an "intentional' tort against another person? For instance, suppose that "battery" is defined as the intentional infliction of a harmful or offensive contact (the definition given *infra*, p. 9). Suppose further that we are interested in determining whether a slap given by A to B's face is a battery. Does A have the necessary intent if he merely intended to move his hands through the air as a gesture to make a point, and did not intend either to touch B or to frighten him? What if he did intend to touch him, but did not intend to harm him?

1. **Summary of rule:** It is difficult to formulate a definition of intent which would apply to the battery example given above, and to all the other torts discusssed in this chapter. Therefore, the precise kind of intent required for each of these torts will be discussed when the other aspects of that tort are treated. However, a general principle applicable to all these torts can be stated:

   a. **General principle:** The intent must be at least to bring about some sort of ***physical or mental effect upon another person***, but does not need to include a desire to "harm" that person. Thus the gesture described above would not be a battery, since the person making it did not intend to touch or frighten the person he hit; this is true even though he did intend to move his hand through the air. But the slap that was not intended to "harm" the victim is nonetheless a battery, since there was an intent to ***make the bodily contact***.

2. **Intent to commit different tort:** Suppose a person intends to commit one tort, but in fact commits another. For instance, suppose A intends to frighten B by shooting at him and missing, but he accidentally hits him. He will be held to have had the intent necessary for a battery, even though the only tort he intended to commit was the tort of assault (the intentional infliction of an "apprehension of a bodily contact".) See Rest. 2d §18(1). The rule that a person who intends to commit one intentional tort and in fact commits another is liable, apparently applies no matter which kinds of torts are involved. (E.g., if A accidentally hits B while trying to subject him to false imprisonment, he is liable for battery.) See Prosser, p. 33.

B. **"Substantial certainty" rule:** An occurrence is obviously "intentional" if the actor desires to bring it about. But tort law also calls it intentional if the actor didn't desire it, but ***knew with substantial certainty*** that it would occur as a result of his action. See Rest. 2d, §8A.

★ **Example:** Brian Dailey, five years old, pulls a chair out from under P as she is sitting down. The evidence at trial shows that he did not desire that she hit the ground, but that he may have known with substantial certainty that she was trying to sit, and would hit the ground. *Held,* the case must be remanded to the trial court, to determine whether Brian indeed knew with substantial certainty that P would fall. If so, he meets the intent requirement for battery.

On remand, the trial court found that Brian knew with substantial certainty that P was trying to sit when he pulled the chair away, and that there was therefore the intentional tort of battery (defined *infra*, p. 9). *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

1. **Less than substantial certainty:** But if it is not "substantially certain" that the invasion of the plaintiff's interest in his person will occur, but merely highly likely, the act is not an intentional tort. This is true even though it may be "reckless", and may give rise to liability for negligence.

Example: Suppose Brian Dailey, in the above example, thought it was very probable, but not "substantially certain", that P would hit the ground when he pulled out the chair. His act ("act" defined here as his causing the aunt to hit the gound, since that is the respect in which her interest in her person was invaded) is not "intentional", and cannot give rise to battery. It might, however, give rise to a cause of action for negligence, if Brian in acting had failed to meet a reasonable standard of care for one of his age.

a. **Act distinguished from consequences:** But while the "act" must be intentional or substantially certain, as distinguished from highly probable, this is not true for the ***consequences*** of the act. Thus if D intends to tap P lightly on the chin, to annoy him, and unbeknown to D, P has a "glass jaw", D will be liable for any unforeseeable injury suffered by P as a result of the tap. In other words, the causing of the tap, the contact, must be intentional or substantially certain, but the consequences (the injury), do not have to be intended or substantially certain, or even foreseeable. See the further discussion of this matter *infra*, p. 10.

i. **Contrary view:** However, at least one court has refused to make this distinction between intending an act and intending its consequences.

★ **Example:** D, in an effort to tease P (whom he knows to be shy), gives her a "friendly unsolicited hug." Immediately after the hug, P suffers a sharp pain in her head and neck and is paralyzed on the left side of her face and mouth. P sues based on the intentional torts of assault and battery, as well as on a negligence theory. D asserts that if P has any claim, it can only be for the intentional torts, and that these are barred by the statute of limitations (which is shorter in this jurisdiction for intentional torts than

for negligence). The trial court agrees, and grants D summary jugdment.

Held, for P. It is true that a person may have intended a result if he knew that it was "substantially certain" to occur. But here, although D intended to touch P, he could not have reasonably believed that injury to P was substantially certain to follow. Therefore, he did not commit the intentional torts of assault and battery. (However, the court noted, if the risk of harm was reasonably foreseeable, even though not substantially certain to occur, D may be liable for negligence.) *Spivey v. Battaglia*, 258 So.2d 815 (Fla. 1972).

Note: This case is clearly erroneous, at least if one accepts the view that the intent required for battery is merely the intent to commit an act which the actor knows or should know is likely to be harmful or offensive. D should certainly have known that P would find the hug offensive, in view of her shyness; he should therefore have been liable (apart from the Statute of Limitations) for battery.

C. No intent to harm necessary: A person can have the intent necessary for an intentional tort even though he does not desire to ***"harm"*** the victim, and does not have a hostile intent.

Example: D, a schoolboy, kicks his classmate P. The jury finds that although D intended to kick P, he did not intend to harm him. Nonetheless, P suffers severe injuries. *Held*, whether D intended to harm P is irrelevant, as long as D intended to kick P. *Vosburg v. Putney*, 50 N.W. 403 (Wisc. 1891).

1. **Ignorance of the law no excuse:** Similarly, it is irrelevant that the defendant did not know that his action would constitute a tort or a crime. Thus in the law of intentional torts, "ignorance of the law is no excuse".

2. **Lunatics are liable for their torts:** ***Insane people*** have been held to be capable of committing intentional torts.

★ **Example:** P, a registered nurse, is charged with the care of D, an insane person. During a fit of rage, D strikes P on the head with the leg of a piece of furniture. P sues for assault and battery. *Held*, for P. If an insane person is capable of forming an intent to do a harmful act, he may be held liable for the intentional tort just as a normal person would be. The fact that insanity may have been the cause of the intent is irrelevant. Here, the jury could reasonably find that D was capable of intending to strike P. *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937).

Note: As indicated by the *McGuire* court, an insane person may be ***incapable*** of forming the necessary intent. This is particularly likely to be the case with respect to a tort requiring an unusual degree of intelligence or rationality, such as ***deceit***. See *Irvine v. Gibson*, 77 S.W. 1106 (Ky. 1904).

D. Transferred intent: In all kinds of intentional torts, the doctrine of ***"transferred intent"*** may apply. This doctrine holds that as long as the defendant held the necessary intent with respect to one person, he will be held to have committed an

intentional tort against ***any other person who happens to be injured.***

★ **Example:** D sees Smith and X on D's shed. D throws a stick at Smith or X, and accidentally hits P. *Held*, assuming that D was using an unreasonable degree of force, he is liable to P, even though it was not P he was trying to hit. *Talmage v. Smith*, 59 N.W. 656 (Mich. 1894).

1. **Different kind of tort intended:** We saw above that if a defendant intended to commit an assault, and in fact struck the plaintiff, he will be deemed to have had the intent necessary for battery. This rule applies in the "transferred intent" situation as well. Thus if A intends to frighten B by shooting near him, and the bullet accidentally hits C, A has committed a battery upon C.

II. NOMINAL AND PUNITIVE DAMAGES

A. Significance of intent: Often the judge or jury will have to decide whether a defendant's conduct constituted an intentional tort, or merely negligence. Assuming that it is either one or the other, how they decide will have several possible consequences. But the most important is probably the ***measure of damages.***

1. **Nominal damages:** If the tort is held to have been an intentional one, the judge or jury may award ***nominal damages***,(i.e., a token sum), even if the plaintiff cannot show that he suffered any actual pecuniary harm. But if the tort is merely that of negligence, nominal damages are not awardable, and the plaintiff may recover only the damages that he shows he actually suffered.

   Example: D attempts to shoot P. He misses, but P sees him aiming, and is frightened. This is the intentional tort of assault, and P will be entitled to recover nominal damages (perhaps $1.00) even if he cannot show that he suffered more than a momentary fright of little consequence. But if D had been hunting, and had almost shot P out of negligence, P could not recover nominal damages. He would recover only the actual damages he sustained (though these might include a sum in compensation for fright suffered during and after the episode, so-called "mental suffering" damages.)

2. **Punitive damages:** An intentional tort victim may also recover ***punitive*** damages, if the defendant's conduct was outrageous or malicious. Rest. 2d, §908. Such damages may be very substantial (perhaps even in the hundreds of thousands of dollars), and may be awarded even where little or no compensatory damages are awarded. Thus in the above example of an attempted shooting, P would have a good chance of being awarded substantial punitive damages together with nominal damages and slight or no compensatory damages.

   a. **Negligence:** In ordinary negligence cases, on the other hand, punitive damages are not awardable. Rest. 2d, §908, Comment b.

   b. **Non-outrageous conduct:** Nor are punitive damages awardable in *every* intentional tort case. It is only where the conduct is outrageous or malicious that they will be allowed. For instance, in a situation like *Vosburg v. Putney*,

supra, where the defendant intended the kick but meant no harm, the court would almost certainly hold as a matter of law that the jury could not award punitive damages.

III. SCOPE OF LIABILITY

A. Distinction: Another important consequence of the distinction between intentional torts and neligence has to do with liability for unexpected results. Whereas the negligence defendant will generally be held liable only for those consequences which were at least somewhat foreseeable, the intentional tortfeasor will be liable for virtually every result stemming directly or even somewhat indirectly from his conduct, however unlikely it might have seemed at the time of his act that this result would follow. Rest. 2d, §435B.

Example: D intentionally hits P on the head intending merely to annoy him. P is slightly injured, and is taken to the hospital. There, by a gross and completely unexpectable error, a nurse gives him poison instead of medicine, and P dies. D will be liable for P's death, not just the minor injury. But if D had merely negligently given P the same minor injury, he would not be liable for the unanticipated death. Rest. 2d, §435B, Illustr. 1.

IV. BATTERY

A. Battery Generally: Battery is the intentional infliction of a ***harmful or offensive bodily contact***. See Rest. 2d, §§13, 18.

Example: A intentionally punches B in the nose. A has committed a battery.

1. **Intent:** As stated above, it is not necessary, for battery, that the defendant desires to ***harm*** the plaintiff. Also, if he intends to commit an ***assault*** (e.g., he intends to frighten the plaintiff — see the definition of assault *infra*, p. 11), and he accidentally makes a "harmful or offensive contact", he has committed battery.

B. Harmful or offensive contact: Battery of course includes the infliction of contacts that are truly "harmful", in the sense of causing pain or bodily damage. But it also includes contacts which are merely ***"offensive"***, i.e., damaging to a ***"reasonable sense of dignity".***

Example: P consults D, an ear doctor, about her right ear. She consents to an operation on that ear, but does nothing about her left ear. During the operation, D discovers that the left ear (but not the right ear) needs surgery, and performs it. *Held*, the surgery on the left ear was an unauthorized, offensive contact, and constituted battery even though it was not in fact harmful to P's health. *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

C. Reasonableness standard for "offensive" contact: In determining whether a particular contact is "offensive", the standard is not whether the particular plaintiff was offended, but whether "an ordinary person not unduly sensitive as to his dignity" would have been offended. (Prosser, p. 37).

1. **Ordinary and reasonable contacts:** Thus if A gently pushes past B in a crowded subway, or taps him on the shoulder to ask directions, no battery will be found even if it turns out that B is unduly sensitive and was in fact offended by the touching. But if A uses violence to push past B, this will be battery. See *Cole v.*
★ *Turner*, 90 Eng. Rep. 958 (Eng. 1704).
2. **Where defendant has knowledge of plaintiff's sensitivity:** But suppose that the defendant happens to have known that the plaintiff was an unusually sensitive person (e.g., a Howard Hughes-type who is afraid that being touched by a stranger will infect him). Can the defendant be held liable for a touching which would not be offensive to a normal person? Neither the Restatement (Rest. 2d, Caveat to §19) nor Prosser (p. 37) gives a definitive answer to this question, although the latter states that ". . . Where there is any doubt at all the plaintiff's expressed wishes may very well turn the scale as to what is reasonable, [but] it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself. . . ."

D. Extends to personal effects: A battery may be committed not only by a contact with the plaintiff's body but also by a contact with his clothing, an object he is holding, or anything else that is so closely identified with his body that contact with it is as offensive as contact with the body would be. See Rest. 2d, §18, Comment c; see also Prosser, p. 34.

★ **Example:** P, who is Black, is attending a luncheon at the Brass Ring Club, located in D hotel. As P is standing in line waiting for his food, one of D's employees snatches the plate from P's hand, and shouts that because P is black, he cannot be served in the club. P is not actually touched, nor is he frightened. He is, however, highly embarrassed. *Held*, P has suffered a battery. "The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body." Furthermore, P can recover compensatory damages for his mental suffering, even though there was no physical injury. ***Fisher v. Carrousel Motor Hotel, Inc.***, 424 S.W.2d 627 (Tex. 1967).

1. **Indirect contact:** It is not necessary that the defendant touch the plaintiff with his own body. It is sufficient if he causes the contact indirectly. (e.g. by ordering his dog to attack the plaintiff). See Rest. 2d, §18, Comment c.

E. Plaintiff's awareness of contact: It is not necessary that the plaintiff have ***actual awareness*** of the contact at the time it occurs.

Example: D kisses P while she is asleep, but does not waken or harm her. D has committed battery. Rest. 2d, §18, Illustr. 2.

F. Unforeseen consequences: Once it is established that the defendant intended to commit a harmful or offensive touching (or intends any other tort, such as assault) and such a contact occurs, the defendant is liable for ***any consequences which ensue***, even though he did not intend them, and in fact could not reasonably have foreseen them. (This is, as noted above, true for intentional torts generally.)

Example: D is playing golf. P, his caddy, is not paying attention, and D becomes annoyed. Intending to frighten P but not to hurt him, D swings at him with a golf club but stops eight inches from P's head. Because of the negligence of the manufacturer of the golf club, the head of the club flies off and hits P in the eye. D could not have discovered the defect in the club without removing the head. Nonetheless, he is liable to D for the injury to the eye, since he intended to commit an act which would have been an assault (i.e., the causing of an imminent apprehension by P of a harmful bodily conduct). See Rest. 2d, §16, Illustr. 2.

G. **Damages:** If the plaintiff can establish that the intentional harmful or offensive contact occurred, he may, as noted, recover ***nominal damages*** even if he suffered no physical injury. This might be the case, for instance, where the contact is "offensive" but not "harmful".

1. **Mental disturbance:** Also, he may recover compensation for any pain, suffering, embarrassment, or other ***mental effect***, even in the absence of physical harm.

★ **Example:** The plaintiff in *Fisher v. Carrousel Motor Hotel, Inc.*, *supra*, p. 10, was allowed to recover $400.00 in compensatory damages for his "humiliation and indignity" even though he suffered no physical injury. (He also recovered $500.00 in punitive damages, a subject discussed immediately below.)

2. **Punitive damages:** If the defendant's conduct was particularly outrageous, the court may, as noted, award ***punitive damages***. The subject of punitive damages is discussed more generally *supra*, p. 8.

Example: H and W run a nursing home at which P is an employee. They loan P $200.00 for dental work, with which she pays a dentist to make her a dental bridge. P then quits. H and W are enraged, and forcibly remove the plate from P's mouth, in an attempt to keep the plate as security. *Held* (on appeal), P is entitled to $1000 in punitive damages from each of the defendants (but not $2500 from each, as awarded by the jury.) *Jones v. Fisher*, 166 N.W.2d 175 (Wisc. 1969).

V. ASSAULT

A. **Definition:** Assault is the intentional causing of an ***apprehension*** of ***harmful or offensive contact***. See Rest. 2d, §21.

1. **Explanation:** In other words, the defendant has committed the tort of assault if he has intentionally caused the plaintiff to think that he, the plaintiff, will be subjected to a harmful or offensive contact. The interest being protected is plaintiff's interest in freedom from ***apprehension*** of the contact; thus the tort can exist even if the contact itself never occurs.

★ **Example:** P runs a tavern with her husband. One night when the tavern is closed, D demands wine. P leans out the window to tell him to go away, and D

swings at her with a hatchet. He misses, but P is frightened by the attempt. *Held*, D has committed the tort of assault, even though P was not touched. ***I. De S. and Wife v. W. De S.*** (Eng. 1348).

B. Intent: To have the requisite intent, the defendant must either have intended to cause the apprehension of contact, or have intended to cause the contact itself. See Rest. 2d, §21(1)(a) and (b).

1. **Intended apprehension:** Thus if the defendant merely intends to frighten the plaintiff, and does not intend for there to be an actual contact, he has the necessary intent.

2. **Attempted battery:** Furthermore, if the defendant intends to commit a battery, and does not intend to put the plaintiff in apprehension of a contact, he also has the necessary intent for assault.

   Example: D sneaks up behind P, intending to shoot him through the back of the head. P happens to turn around just as D is raising the gun. P thinks that D is about to shoot him, but D in fact lowers the gun because he has been discovered. D had the necessary intent for an assault, even though he never intended to put P in apprehension of the bodily contact (and in fact desired that P never know what hit him).

3. **No hostility required:** As in the case of battery, it is not necessary that the defendant bear malice to the plaintiff, or intend to harm him. See Rest. 2d, §34.

   Example: D, as a joke on P, disguises himself as a tramp. He jumps out in front of P on a lonely road, points an unloaded pistol at him, and says "your money or your life." D has the necessary intent for assault, even though he bore P no malice, and did not intend to harm him (provided that he intended to cause P to become apprehensive of a harmful contact, e.g. a bullet in the head). See Rest. 2d, §34, Illustr. 1.

4. **Transferred intent:** Again, as in the case of battery, the doctrine of ***"transferred intent"*** applies. Thus if D throws a stone at X, and P, who is standing nearby, is put in fear of being hit, D is liable to P for assault even though he never intended either to hit or frighten P. See Rest. 2d, §33.

C. "Words alone" rule: Many cases state the general principle that "words alone are not sufficient to constitute an assault". These cases hold that words must be accompanied by some ***overt act***, no matter how slight, that adds to the threatening character of the words.

★ **Example:** According to the Ps' amended complaint, the Ds "threatened the [Ps] with threats of violence that the [Ds] would commit immediate bodily harm upon the [Ps] and would strike the [Ps] with blackjacks and would otherwise hit them with great force and violence." The complaint also states that the Ds on the same day showed the Ps blackjacks (but does not

allege that this occurred at the same time as the verbal threats). *Held*, no cause of action is stated. "Threatening words alone are deemed insufficient in this jurisdiction to put a person in reasonable apprehension of physical injury or offensive touching." The display of blackjacks does not convert "unactionable words" into an assault unless it is clear that the blackjacks are to be used to carry out the threatened battery. *Cucinotti v. Ortmann*, 159 A.2d 216 (Pa. 1960).

1. **Qualification:** Some commentators, however, as well as the Second Restatement, suggest that there may be cases where the surrounding circumstances are such that words by themselves, without any overt act, are sufficient to constitute an assault. See Rest. 2d, §31.

   Example: D, a notorious gangster, who is known to have killed other men, telephones P and tells him that he will shoot him on sight. Coming around the corner, P encounters D standing on the sidewalk. Without moving, D says to P, "your time has come". D has committed an assault upon P, according to the Restatement. Rest. 2d, §31, Illustr. 4.

2. **Words may negate assault:** Although words by themselves will almost never constitute an assault, their impact must be taken into account, along with any overt act, in determining whether there has been one. Just as threatening words may convert an overt act into an assault where it would otherwise not be one (e.g., D reaches into his pocket, and says to P, "I've got a gun in my pocket and I'm going to fill you full of lead"), words may also negate an intent to commit assault.

   ★ **Example:** It is assize time and the travelling judges are in town. P gets into an argument with D, puts his hand on his sword, and says "if it were not assize-time, I would not take such language from you." D then attacks P, injuring him. *Held*, P has made no assault, because these words make it clear that despite gesture of reaching for his sword, he had no intent to commit a present battery or assault. Therefore, D cannot claim self-defense, and is liable for P's injuries. See *Tuberville v. Savage*, 86 Eng. Rep. 684 (Eng. 1669).

D. Imminence of threatened contact: It must appear to the plaintiff that the harm being threatened is ***imminent.***

1. **Future threats:** Threats of future harm cannot constitute assaults, although they may constitute the tort of intentional infliction of emotional distress (discussed *infra*, p. 22).The dividing line between a threat of imminent harm and one of future harm is hard to define, but the courts and commentators have taken a relatively strict view requiring a ***short period*** between the making of the threat and the time when, according to the threat, the harm will take place.

   Example: "A threatens to shoot B and leaves the room wth the express purpose of getting his revolver." A has not committed an assault on B. Rest. 2d, §29, Illustr. 4.

2. **Present ability to commit harm:** The defendant must have what appears to the plaintiff to be the ***present ability*** to commit the threatened contact. Just as there is no assault if the defendant's words indicate that the threatened harm will not take place imminently, so there will be no assault if it is apparent to the plaintiff that the defendant does not have the ability to commit the threatened harm immediately.

   ★ **Example:** P, a woman, comes into a telegraph office managed by D, and reminds D that he is under contract to fix her clock. D, standing behind the counter, says "If you will come back here and let me love you and pet you, I will fix your clock." D then leans forward across the counter, attempting to touch P. *Held*, it is a question for the jury whether or not the counter was so wide that D could not have leaned over and touched P. (By implication, if the counter was so wide that D could not have touched P, there could be no assault, even though P may have worried that D would come around the counter and chase her.) *Western Union Telegraph Co. v. Hill*, 150 So. 709 (Ala. 1933).

E. Plaintiff unaware of danger: Since the tort of assault protects what is essentially the plaintiff's interest in freedom from a mental condition (apprehension of imminent contact), the plaintiff must be ***aware*** of the threatened contact.

Example: D, standing behind P, raises his gun to shoot P. X, a bystander, sees what is about to happen and disarms D before he can shoot. P then turns around, and realizes for the first time the danger that he has been subjected to. Because P was not aware of the threatened harm at the time the threat existed, he cannot recover for assault, no matter how shaken up he becomes after the fact. See Rest. 2d, §22, Illustr. 2.

F. Apprehension is not same as fear: The plaintiff must have "apprehension" of imminent harmful or offensive contact. But "apprehension", as the term is used in the definition of assault, does ***not necessarily mean "fear"***. It is sufficient that the plaintiff believes that if he does not take action, a harmful or offensive contact will occur in the near future. The plaintiff's right to recover is not negated by the fact that he is confident of his own ability to take action to avoid the contact.

Example: "A, a scrawny individual who is intoxicated, attempts to strike with his fist B, who is the heavyweight champion pugilist of the world. B is not at all afraid of A, is confident that he can avoid any such blow and in fact succeeds in doing so." A has nonetheless committed an assault on B. Rest. 2d, §24, Illustr. 1.

1. **Where threat by itself incapable of performance:** But if it appears to the plaintiff that even without action on his or a third person's part, the defendant will be unable to make good his threat of harm, there is no assault.

   Example: D points a pistol at P, threatening to shoot. P happens to know that D is holding not a loaded weapon, but a water pistol with no water in it. Because P knows that D will not be able to make good his threat in the

imminent future, there is no assault, regardless of how hard D is trying to frighten P.

Note: Suppose, in the above example, that P knew that D was holding a water pistol, but that he also knew that the water pistol was loaded. Would the threat of being sprinkled with water be sufficient to give rise to an action for assault? Remember that P's mental state must be apprehension of an imminent "harmful or offensive" contact; it is quite possible that having water sprayed in one's face would be an offensive contact, although obviously not a harmful one. If so, P would have an action for assault.

G. **Unreasonable apprehension:** Just as most courts have held that a battery does not exist where it is only because of the plaintiff's unusual sensitivity that a particular contact is offensive, so the courts have generally held that a plaintiff who is unusually timid may not recover for assault where a normal person would not have an apprehension of contact. See Prosser, p. 39.

1. **Restatement view:** The Second Restatement, however, takes the position that as long as the defendant ***intends*** to put the plaintiff in apprehension of an immediate bodily contact, and succeeds in so doing, there is an assault "although [the] act would not have put a person of ordinary courage in such apprehension". Rest. 2d, §27.

H. **Threat to third persons not actionable:** The plaintiff must have an apprehension that ***he himself*** will be subjected to a bodily contact; he may not recover for his apprehension that someone else will be so touched.

Example: P sees D raise a pistol at P's wife. P realizes the danger his wife is in, and manages to disarm D before he fires. P cannot recover for assault, because although he was apprehensive of an imminent bodily contact, it was a contact upon his wife, not upon P himself. See Rest. 2d, §26.

Note: It is anomalous that P in the above example cannot recover for assault, despite the very real fear for the safety of his wife that he feels; yet P, the heavyweight boxer in the example on p. 14, who is confident of his ability to avoid the blow, may recover, despite his absence of fear. This discrepancy is due to historical reasons. P in the above example could, however, probably recover for intentional infliction of mental distress, a modern tort discussed *infra*, p. 22.

I. **Ability to carry out threat:** We have seen that the plaintiff must believe that the defendant has the ability to carry out his threat of contact unless the plaintiff or some third force intervenes. But it is not necessary that the defendant ***in fact*** have the ability to carry out the threat.

★ **Example:** P, a tenant in an apartment owned by D, decides to move out of the building. On moving day, D arrives at the apartment, and at close range, points a pistol at P's face and threatens to shoot her if she moves

out. P sues for assault. *Held*, P does not have to show that the pistol was in fact loaded, in order to recover for assault. It is the apprehension created in the mind of P, not the undisclosed intentions of the person committing the assault, that is relevant. *Allen v. Hannaford*, 244 P. 700 (Wash. 1926).

J. Conditional threats: Suppose the defendant threatens the plaintiff with immediate bodily harm unless the defendant will pay him money, turn over a secret formula, or something of the like. Does the fact that the threat is ***conditional*** mean that the defendant has not committed an assault?

1. **Question of legal right:** The Second Restatement and the courts hold that there is nonetheless an assault unless the defendant had the ***legal right*** to compel the plaintiff to perform the act in question. Since the robber has no legal right to force his victim to turn over his money, and the industrial spy has no right to compel disclosure of the secret formula, they may not use the existence of these demands as an escape hatch from an assault suit.

   a. **Privilege:** But if the defendant is privileged to enforce the condition, there is no assault unless he uses or threatens ***unreasonable force in presenting the choice between contact and compliance.***

      Example: P, a burglar, breaks into D's house. D surprises him, and says "If you don't get out, I will throw you out." There is no assault, since D has the legal right to throw P out (see discussion of defense of property, *infra*, p. 58.) If P were a maid, whom D was firing, and D pointed a pistol at P and said " Get out right now or I'll shoot you through the head," there would be an assault. This is so because although D would be entitled to put P out of the house, he is threatening the use of unreasonable and unlawful force. See Rest. 2d, §30, Illustrs. 1 and 2.

K. Assault is not attempted battery: From the above discussion, it should be clear that an assault is not the same thing as an "attempted battery", despite the tendency of some courts to think that it is. Thus an assault is committed where the defendant intends to frighten the plaintiff by pointing a pistol at him, but does not intend to shoot him; this is clearly not an attempted battery.

L. Abandoned attempt: The tort of assault is complete as soon as the plaintiff suffers the requisite apprehension. It is not negated by the fact that the defendant subsequently has second thoughts, and ***abandons*** his plan.

Example: D points his pistol at P, intending to shoot P. P sees the danger, and is apprehensive that he will in fact be shot. D changes his mind, lowers the pistol, and says to P, "I was going to shoot you, but I've changed my mind". The tort of assault was complete as soon as P had an apprehension that he would be shot. D had the requisite intent (remember that an intent to commit a battery, like an intent to cause an apprehension of a battery, is sufficient — see *supra*, p. 12). The fact that D changed his mind, and never committed the battery, does not negate the assault.

M. Damages: The rules for damages in the case of assault are the same as in the case of battery.

1. **Nominal damages:** Thus nominal damages can be awarded where the plaintiff shows no out-of-pocket loss.

2. **Mental suffering:** Similarly, he can be awarded compensatory damages based upon his mental suffering. In fact, since the tort of assault is based upon a mental harm, mental suffering forms the principal or sole foundation for damages in most cases. If, however, the plaintiff suffers physical injury or ailment as a result of the assault (e.g., he is frightened, and tries to run away, and is hit by an oncoming car), he may recover for this as well.

3. **Punitive damages:** And, if the defendant's conduct is sufficiently outrageous or malicious, punitive damages may be awarded.

VI. FALSE IMPRISONMENT

A. **Definition:** The tort of "false imprisonment" is defined as the intentional infliction of a ***confinement***. It is unclear whether the plaintiff must be aware of the confinement; this issue is discussed below.

B. **Intent:** Since false imprisonment is an intentional tort, the plaintiff must show that the defendant intended to confine him. As with assault and battery, he can meet this burden by showing that the defendant knew with ***"substantial certainty"*** that the confinement would result.

C. **Transferred Intent:** Similarly, as with assault and battery, the doctrine of ***"transferred intent"*** applies.

> **Example:** P is shopping in the D store. D's store detective, an unduly zealous man, erroneously and unreasonably believes that X, who is also shopping in the store, has attempted to shoplift. He orders all exits to the store to be closed. This has the effect of confining P, who the detective does not even know to be in the store. Since the detective had the requisite intent for false imprisonment vis-a-vis X, D will be liable to P as well as to X for false imprisonment, by the doctrine of transferred intent.
>
> **Note:** The reasons for which D is liable to X for false imprisonment, despite the detective's honest though unreasonable belief that X has been shoplifting, are discussed *infra*, p. 66, in the treatment of the defense of recapture of chattels. If D were not liable to X because the detective's belief, although erroneous, was reasonable, it is not clear whether D would be liable to P. Probably, however, the detective would be held not to have had the requisite intent vis-a-vis X, and the doctrine of "transferred intent" would have no application, thereby absolving D with respect to P's suit as well.

D. **Nature of confinement:** The plaintiff must be confined within ***definite physical boundaries***. Blocking of the plaintiff's path is not enough: it is not enough that the path the plaintiff wishes to travel is obstructed by the defendant, or that the plaintiff is prevented from entering a particular place.

1. **Confinement:** In other words, the essence of the idea of "confinement" is that the plaintiff is held ***within*** certain limits, not prevented from entering certain places. The distinction is a matter of degree, but most cases will be clear one way or the other. See Prosser, p. 42; see also Rest. 2d, §36(3).

   ★ **Example:** A portion of a public road has been reserved for paying spectators of a boat race. P wants to enter the restricted area, but is prevented from doing so by D's policeman. *Held*, P has been confined in the sense that he was not permitted to go in the spectating area. However, since he was free to travel along the other direction of the road, he has ***not*** been subjected to false imprisonment. *Bird v. Jones*, 115 Eng. Rep. 668 (Q.B. 1845).

   Note: The result in the above example is the same regardless of whether D's blocking off of the highway was lawful. See Rest. 2d, §36, Illustr. 11.

E. Means of escape: It is irrelevant that there is some means of escape from the area of confinement, provided that the plaintiff does not know of this means. Rest. 2d, §36(2).

1. **Means must be "reasonable":** Even if the plaintiff does know the means of escape, he will not lose his action for false imprisonment unless the means is "reasonable". The Second Restatement (§36, Comment a) takes the view that the means of escape is reasonable only if the plaintiff's use of it would not be physically dangerous to the plaintiff, harmful to his clothing, "offensive" to his "reasonable sense of decency or personal dignity", or dangerous to some third person.

F. Means by which confinement enforced: If the plaintiff is physcially confined, as where he is put in a room with all doors locked, the confinement obviously meets the requirements for false imprisonment. But there are other, less explicitly physical, kinds of duress to confine a person, which may also give rise to the tort.

1. **Use of threats:** Thus if the defendant threatens to use force if the plaintiff tries to escape, the requisite confinement exists. This is so whether the threats are explicit, or merely implied by the defendant's conduct.

   ★ **Example:** D, a policeman, is informed that P has stolen shoes from a store. D goes to P's house, which is outside D's jurisdiction, and says to P, "Consider yourself under arrest. You must go back to Granite Falls with me." D agrees, however, that P need not go to Granite Falls until the next morning, which P does. No warrant for the theft is ever issued, and P sues D for false imprisonment. *Held*, P's confinement was implied by D's statement that P was under arrest. Due to the fact that D was wearing a police uniform, P had "reasonable ground to apprehend that coercive measures [would] be used if he [did] not yield"; therefore, he was falsely imprisoned, despite the fact that D had no authority in P's town, and that no actual force was used to keep him in his house or to make him go to Granite Falls. *Martin v. Houck*, 54 S.E. 291 (1906).

a. **Plaintiff's desire to clear himself:** However, if the plaintiff's confinement is due solely to his own desire to clear himself of suspicion, there is no false imprisonment. Thus in the usual case where a suspected shoplifter submits to a search, or remains for questioning at the store, the existence of false imprisonment will turn on whether the plaintiff submitted to the search or questioning solely to clear himself, or, rather, submitted at least in part because of the threat of implied force.

★ **Example:** P is shopping in the D store. A detective who works for D accuses P of shoplifting. The detective takes P to a small room in the store, where she is searched. D claims that there is no false imprisonment, because P asked the detective to search her, so that she could establish her innocence. P claims, however, that the detective said to her "You will have to be searched". *Held*, the jury could properly find that P had not volunteered to be searched solely to clear herself, and that she had submitted to the search in part because of D's employee's exercise of "dominion" over her. "[P] was surrounded by superior force, to contend against which was beyond her physical powers, and she had been told what she had to do, and she surrendered unconditionally . . ." *Stevens v. O'Neill*, 64 N.Y.S. 663 (N.Y. 1900).

Note: Even if the detention of a suspected shoplifter is not voluntary, the detention may be ***privileged*** if it is brief and the store's suspicion is reasonable. See *infra*, p. 66.

2. **Threat to harm others:** Just as a threat to use force against the plaintiff if he tries to escape may give rise to false imprisonment, so may a threat to harm a third person if the plaintiff tries to escape. Thus if the defendant threatens to harm the plaintiff's wife if the plaintiff does not remain in a particular room, there is false imprisonment. See Rest. 2d, §40A.

3. **Threat to property:** Threats to the plaintiff's ***property*** may also constitute the necessary duress. For instance, if a storekeeper believes that a customer has been shoplifting, and seizes her purse to dissuade her from leaving, there will probably be false imprisonment.

   a. **Threats of future harm:** But the duress, whatever its nature, must involve ***imminent*** harm. Threats of future harm (e.g. "if you don't stay here in my store and clear yourself of shoplifting, I'll call the police and have them arrest you at your house"), as in the case of assault and battery, are not sufficient. See Prosser, p. 45.

4. **Assertion of legal authority:** Just as the confinement may be caused by threats of force, so it may be caused by the defendant's assertion that he has ***legal authority*** to confine the plaintiff. This is so even if defendant does not in fact have legal authority, as long as the plaintiff reasonably believes that he has, or is in doubt about whether he has, such authority. See Rest. 2d, §41.

   Example: D is a private detective who works for Storekeeper. He sees P leaving

the store, and chases him down the street. When he catches up to him, he says "I'm a plainclothes policeman, and I hereby arrest you." P believes D's statement, and follows D back to the store for interrogation. D is liable for false imprisonment, even though he used no force.

a. **Validity of asserted authority:** For purposes of determining whether there has been a prima facie case of false imprisonment, it is ***irrelevant whether the asserted legal authority is in fact valid or invalid***. Thus in above example, it is irrelevant whether D was only a store detective who under local criminal law had no authority to make the arrest in question, or was in fact a policeman. As long as the plaintiff believes that the defendant has legal authority, or is in reasonable doubt about whether the defendant has such authority, there is false imprisonment if the plaintiff submits.

   i. **Defense of valid arrest:** Of course, if the defendant ***in fact*** had the right to make the arrest, this will serve as a ***defense*** to a false imprisonment claim. The rules governing when arrests may be validly made by policemen and private citizens are discussed *infra*, p. 71.

b. **Actual submission necessary:** The mere assertion of legal authority will be sufficient if the plaintiff in fact submits to the confinement (as P in the above example did by going back to the store). But if the plaintiff refuses to submit, and leaves, the defendant's assertion of legal authority will not be enough to give rise to an action for false imprisonment. Thus in the above example, if P merely walked away from D, D's statement "I arrest you" would not in itself be a false imprisonment. However, if D used force to detain P, that use of force would of itself be false imprisonment.

c. **Instigation in arrest:** If a private citizen participates in an arrest which turns out to have been unlawful (under the rules discussed *infra*, p. 69), he may be liable for false imprisonment even though he was not the one who ultimately made the arrest itself. Thus if the owner of a store tells a private detective to detain a suspect, and the detective purports to "arrest" the suspect in circumstances where he does not have the right to do so, the storekeeper may, like the detective, be liable for false imprisonment.

   i. **Mere filing of complaint:** But a private person who merely files a complaint with the police will not be liable. To incur liability, he must take a more active role than the mere furnishing of information (e.g., urging the police to make the arrest). However, one who furnishes information to the police may, if the information is false, be liable for ***malicious prosecution*** (discussed *infra*, p. 349).

   ii. **Distinction:** Even if the defendant does take an active part in the arrest (as by urging the police to make it), he will not be liable for false imprisonment as long as the requisite legal formalities are met. That is, if the police themselves act lawfully (e.g., they obtain a warrant, or they make the arrest in a situation in which no warrant is required, such as where they believe

they have probable cause), the private citizen will not be liable for false imprisonment (though he may be liable for malicious prosecution). But if he actively helps the police, and the police do not follow proper procedures (e.g., they act on information which they know to be false), he will be liable for false imprisonment.

iii. **Summary:** There are thus two requirements for "instigator" liability for false imprisonment: (1) an unlawful arrest must have occurred (judged against the rules given on p. 69) and (2) the defendant must have actively aided the arrest (i.e., persuaded the authorities to make the arrest, rather than merely giving them information and letting them decide what to do about it). See Rest. 2d, §45A.

G. **Duty to aid in escape or release:** It may happen that the plaintiff ***consents*** to an initial confinement (thus negating the tort — see *infra*, p. 47). If so, there will nonetheless be a false imprisonment if the defendant is under a duty to release the plaintiff, or to help him escape, and does not do so. See Rest. 2d, §45.

★ **Example:** D induces P to sail with him from Syria to America, promising to let P off the boat as soon as it arrives in the U.S. The boat arrives at a U.S. port, but D refuses to give P a row boat so that she can leave the yacht. *Held*, D committed false imprisonment, since he had implicitly agreed to furnish P with whatever was necessary (here, a row boat) to enable her to leave the yacht. *Whittaker v. Sandford*, 85 A. 399 (Me. 1912).

Note: In the *Whittaker* case, described in the above example, P was a member of a religious sect, of which D was the leader. P apparently wished to leave Syria because she had abandoned the movement; there is a suggestion in the case that D refused to allow P off the yacht because she would not agree to rejoin the movement. If so, putting the plaintiff to this choice would probably be offensive to her sense of personal dignity as described above (*supra*, p. 18) and D would not be allowed to claim that he had given P a "reasonable means of escape".

H. **Necessity that plaintiff know of confinement:** We have seen that in the case of assault, the plaintiff must be ***aware*** of the tort at the time it is committed, but that in the case of battery, he need not be aware. In false imprisonment cases, most courts have held that the tort is like assault, and that the plaintiff must be aware of his confinement while he is suffering it.

★ **Example:** P, a 10-year-old boy, is a student at the D school. On December 24, P's mother visits the school, and asks the officials to allow P to come home with her for the holidays. Officials refuse to allow P to leave the school until all his fees are paid. Two weeks later P is finally allowed to go home after his mother sues, but at the time he is released, he is unaware that he had ever been confined. *Held*, P was not falsely imprisoned, since he was not aware of the confinement. *Herring v. Boyle*, 149 Eng. Rep 1127 (1834).

1. **Second Restatement view:** The Second Restatement, in §42, holds that

either the plaintiff must be aware of the confinement, or he must suffer some actual harm. The Restatement thus agrees with the result of the *Herring* case, but states that if a six-day-old child is locked in a bank vault for two days, and suffers from hunger and thirst, he has been falsely imprisoned despite his lack of awareness of the confinement.

I. Damages: As in the case of the other intentional torts we have examined, the plaintiff may recover ***nominal damages*** for false imprisonment, even if he has suffered no actual physical or mental harm. He may also recover for mental suffering, humiliation, loss of time, inconvenience, etc., and where actual malice is shown, he may recover punitive damages. See Prosser, p. 43.

VI. INFLICTION OF MENTAL DISTRESS

A. Definition: An increasing number of modern cases have recognized the tort of intentional infliction of mental distress. This tort may be defined as the intentional or reckless infliction, by ***extreme and outrageous conduct***, of severe emotional or mental distress, even in the absence of physical harm.

B. Intent: In the intentional torts we have examined so far (battery, assault and false imprisonment), we have seen that the requisite intent may exist not only where the defendant ***desires*** to cause a certain result, but also where he knows with "substantial certainty" that the result will occur. In the case of infliction of mental distress, however, the necessary mental state is ***even broader*** — the plaintiff may recover if he can show that the defendant either intended to cause the emotional distress, knew with substantial certainty that it would occur, or acted ***recklessly*** (i.e., in deliberate disregard of a high probability that the distress will occur.) See Rest. 2d, §46(1).

1. Meaning of "reckless": For the defendant's conduct to be "reckless", however, it must be in the face of risk that is significantly higher than the risk of harm that would make his conduct "***negligent***". (Negligent conduct is discussed generally *infra*, p. 75). In other words, it is not enough that the defendant acted despite a risk of causing emotional harm that a man of average prudence would recognize was ***unreasonable***. See Rest. 2d, §500.

a. Typical cases: The following are examples of cases holding that reckless disregard of the high chance of causing emotional distress is the equivalent of causing the distress.

Example: D's wife has left him, and he is a guest in the home of a friend of his, P. While P is away from the house, D decides to commit suicide by slitting his throat in P's kitchen. P returns to find his corpse lying there, in a pool of blood and suffers from nervous shock, and becomes ill. She sues D's estate for intentional infliction of mental distress. *Held*, the jury could find that D "willfully" caused P emotional distress, since he acted in disregard of the high probability that she would suffer the distress. Therefore, the tort may be treated as if it were intentional. *Blakeley v. Shortal's Estate*, 20 N.W.2d 28 (Iowa 1945).

Example: P's father dies, and the body is sent to the D Funeral Home. D's employees take numerous actions which make P extremely upset and induce a minor heart attack. The acts include telling P that he cannot view the body of his father because of its gruesome condition and noxious odor (when the body was in fact not in such a state), and failing to wait for P to arrive to view the burial. *Held*, these facts, if proven, would establish that D's employees acted recklessly in causing P's emotional distress, and he is entitled to a trial to prove them. *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976).

2. **"Transferred intent":** The doctrine of "transferred intent" is ***not*** generally applicable in cases of intentional infliction of mental distress. That is, if the defendant attempts to cause emotional distress to X, or to commit some other tort upon him, and P suffers emotional distress (e.g., because he witnesses the defendant's attempt and becomes frightened), P will not usually be able to recover.

   a. **Rationale:** The most frequent reason given for this refusal by courts to make the doctrine of transferred intent generally applicable to infliction of mental distress cases is that it would open too wide the gate for litigation. Prosser, for instance (PW&S, p. 69) suggests that if transferred intent were allowed, three million people watching an assassination of a President on television would be able to sue the assassin.

   b. **Exception:** However, the cases have generally recognized at least one exception to the rule that transferred intent is not applicable: if the defendant directs his conduct at a member of the ***immediate family*** of the plaintiff, and the plaintiff is present. Most of these cases impose the further requirement that the plaintiff's presence be ***known*** to the defendant, so that the mental distress could have been reasonably anticipated by the defendant.

      ★ **Example:** P watches her father being beaten up by D, and as a result of seeing this beating, suffers severe emotional distress. *Held*, since P does does not allege that D knew of her presence (nor that D intended to cause her emotional distress), P's claim does not state a cause of action. *Taylor v. Vallelunga*, 339 P.2d 910 (Cal. App. 1959).

   c. **Restatement has more liberal view:** The Second Restatement, however, extends the category of persons who can recover for conduct which they witnessed being directed at others.

      i. **Bodily harm:** Under the Restatement view, any person who is present at a beating, attack, threat, etc. made to another may recover if he suffers "bodily harm" from watching the episode, even if the witness is not a member of the victim's immediate family. (Once the witness shows bodily harm, he may also recover for purely emotional harm.)

      ii. **Relative:** If the witness is a member of the victim's immediate family, he may recover for his purely emotional distress even if he suffers no bodily harm. See Rest. 2d, §46(2).

Example: P, while walking down the street, is stopped by a stranger, X, who asks him for a match. While P is pulling out his cigarette lighter, X is suddenly shot down by D. As a result, P suffers emotional distress, and becomes physically ill. According to the Second Restatement, P may recover from D on a theory of intentional infliction of emotional distress. See Rest. 2d, §46, Comment l.

3. **Emotional distress where other tort attempted:** We saw (*supra*, p. 4) that if the defendant has attempted to commit an assault or false imprisonment, and in fact commits a harmful or offensive touching, a battery has occurred, even though the touching itself may not have been intentional. A similar rule does ***not***, in general, apply to infliction of emotional distress. That is, if the defendant attempts to commit some other tort, and the only effect on the plaintiff that ends up being produced is emotional distress, the tort of intentional infliction of emotional distress has not occurred. Rest. 2d, §47.

   Example: D tries to shoot P in the back of the head; he hopes that P will not suspect anything until the bullet actually enters. However, as D is aiming, X knocks the gun away. P, when he learns of what D was trying to do, becomes exceptionally distraught, even though the danger is, for the moment, over. This is not an assault, since P did not learn of the danger until after it had passed — see *supra*, p. 14. Nor is it a battery, of course, since no contact in fact occurred. And, even though emotional distress to P resulted, the tort of intentional infliction of emotional distress has not occurred, because D did not have the requisite intent (i.e., the intent to cause the distress, as opposed to intent to cause bodily harm.)

   a. **Assault distinguished:** But keep in mind that if the defendant attempts to commit battery, false imprisonment, or some other intentional tort, and the plaintiff suffers emotional distress in the form of an "apprehension of imminent harmful or offensive contact", the tort of assault has occurred, and the plaintiff can recover for his mental suffering. Similarly, if the plaintiff has mental distress as the result of a battery, he can recover damages for this distress, even though the separate tort of infliction of mental distress has not occurred.

C. **Extreme and outrageous conduct:** For the plaintiff to recover, he must show, among other things, that the defendant's conduct was ***extreme and outrageous***. It is not enough for him to show that the defendant insulted him, or hurt his feelings. Even the defendant's use of profanity to him will not be enough, unless the relationship of the parties is such that the use of the dirty words is particularly outrageous (see the discussion below of aggravating circumstances.)

   1. **Restatement test:** As the Second Restatement has put the idea, the conduct must be ". . . so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arose his resentment against the actor, and lead him to exclaim, 'Outrageous!'." Rest. 2d, §46, Comment d.

2. **Typical cases:** The following are two of the best-known cases in which the defendant's conduct was held to be outrageous, and liability for intentional infliction of emotional distress was found.

   Example: D, as practical joke, tells P that her husband has been badly injured in an accident, and is lying in the hospital with both of his legs broken. D suggests that P go to the hospital to fetch her husband with two pillows. P suffers nervous shock with consequent serious physical illness, and is at one point in danger of going insane. *Held*, P may recover from D for her emotional suffering and physical harm. *Wilkinson v. Downton,* 2 Q.B. 57 (Eng. 1897).

   ★ **Example:** D is a rubbish collector. The president of P, an association of rubbish collectors, summons D to a meeting of the association, and tells him that he, D, is infringing on territory held by one of P's members. The president tells D that if he does not join P, and pay over a portion of the proceeds of his collections, the members of P will beat him up, burn his truck, and put him out of business. D, intimidated, agrees, and signs some notes for payment of these proceeds. D defaults on the notes, P sues on them, and D counterclaims for intentional infliction of emotional distress. *Held*, D may recover on his counterclaim against P for emotional distress, even though he suffered no physical harm. It is not sensible to allow the victim of negligence to recover for mental distress if he can also show physical injury (see *infra*, p. 154) but not to let the victim of conduct ***intended*** to cause mental distress to recover anything unless he can show physical injury. (Also, P may not recover on the notes.) *State Rubbish Collectors Association v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

3. **Individual circumstances of case:** In determining whether the defendant's conduct is sufficiently outrageous, the court will take into account the particular characteristics of the plaintiff, and the relationship between him and the defendant.

   a. **Plaintiff's situation:** Thus if the plaintiff is very young, or retarded, or senile, the defendant's conduct might be held to be outrageous even though it would not be so if the plaintiff were a normal adult. Similarly, if the defendant is or holds himself out to be a policeman in his dealings with the plaintiff, his threats to have the plaintiff arrested might be deemed outrageous, where they would not be if defendant was and appeared to be a private citizen.

   b. **Bill collectors, etc.:** Thus bill collectors, insurance adjusters, evicting landlords, etc., have been held liable where their conduct was excessive and outrageous, particularly where it seems to have been carefully premeditated, and obviously likely to cause the extreme distress which in fact ensued. But where the conduct is not outrageous, there can be no recovery even if the defendant knew that some degree of emotional distress was likely or sure to occur. See P,W&S, pp. 64-65.

   ★ **Example:** D, a finance company, sends one of its bill collectors to the house where P lives with her parents. P is an eleven-year-old girl, and her

parents are out when the collector arrives. When P refuses to allow the collector into the house, the collector shows her a note through the window, which states that if she does not let him in to repossess a television set, the collector will have her thrown in jail. P becomes frightened and shocked, fearful of leaving the house, and unable to sleep at night. *Held*, the jury may find that the collector's actions, which were within the scope of his employment by D, constituted willful misconduct, and that P's resulting problems were "natural and probable consequences" of the misconduct. Therefore, D may be held liable. *Delta Finance Company v. Ganakas*, 91 S.E.2d 383 (Ga. 1956).

c. **Defendant's knowledge of plaintiff's sensitivity:** Where the defendant's conduct is outrageous only because of the plaintiff's particular characteristics, it is usually held that the defendant must have been ***aware*** of these characteristics. Thus if, in the above example, the bill collector had not known that P was a child, there might well not have been liability.

D. Actual severe distress: Once the plaintiff has shown that the defendant's conduct was extreme and outrageous, he must then show that he, the plaintiff, in fact suffered ***severe*** emotional distress.

1. **Medical effects:** At a minimum, the plaintiff must always show that his mental distress was sufficiently severe that he ***sought medical aid***.

★ **Example:** P and D, who are brothers, agree to take care of their mother for alternating six-month periods. After the mother has spent a prolonged stay with P, he takes her to D's home and asks D to watch her for the weekend. D tells P, "That's your mother. We don't want to see her or you anymore." Two days later, without notifying P, D places the mother in a nursing home. Several months later, when the mother dies, D deliberately fails to inform P of the death or of the funeral arrangements. P sues for intentional infliction of mental distress. *Held*, for D. P's testimony that he became "nervous and had many sleepless nights and . . . thought he was going to have nightmares . . . " is insufficient to make D liable for intentional infliction of mental distress, since there is no showing that P sought medical aid. *Swanson v. Swanson*, 257 N.E.2d 194 (Ill. App. 1970).

2. **Physical harm:** Some cases even hold that recovery may be allowed only where there is some ***physical harm*** in addition to emotional distress. See Prosser, p. 59. But most modern courts appear not to require physical harm. Thus in *Siliznoff, supra*, the court explicitly held that the recipient of threats of violence could recover even though he suffered no physical harm.

a. **Restatement view:** The Second Restatement does not require that the emotional distress be accompanied by any kind of bodily harm. However, it notes that courts may tend to look for bodily harm as a guaranty that the emotional distress is real; but if the outrageousness of the act is clear enough, liability will be found without bodily harm. Rest. 2d, §46, Comment k.

3. **Reasonable standard:** In addition to the requirement that the plaintiff suffer severe mental distress, the defendant's conduct must be such that a ***reasonable man*** would suffer such distress. Thus if the plaintiff turns out to be an unusually sensitive person, who suffers severe distress where a normal person would not, there will be no recovery.

   a. **Exception:** However, this "reasonable man" standard does not apply where the defendant has notice that the plaintiff is unusually sensitive. In most respects, therefore, this "reasonable man" rule is merely a restatement of the principle, described above, that the defendant's conduct must be "outrageous", taking into account the peculiarities of the plaintiff that are known to the defendant.

   Example: P is a superstitious old lady, who believes that there is a pot of gold buried in her backyard. D, as a practical joke, plants a pot, containing things other than gold, in P's backyard. P digs up the pot, and D escorts her in triumph to the town hall, where she opens the pot and is humiliated. *Held*, P may recover against D. *Nickerson v. Hodges*, 84 So. 37 (La. 1920).

b. **Insulting language:** ***Insulting words***, even if they are profane, will almost never be enough by themselves to give rise to an action for intentional infliction of emotional distress.

   i. **Two rationales:** Some cases refusing relief rely upon the theory that insults by themselves are never sufficiently "outrageous"; other cases reach the same result by holding that insults do not cause "severe emotional distress" in a person of ordinary sensitivity.

   ★ **Example:** P, a customer in D's supermarket, asks a store clerk for the price of an item. The clerk responds: "If you want to know the price, you'll have find out the best way you can . . . you stink to me." *Held*, for D. The clerk's statement would not cause severe emotional distress to a "person of ordinary sensibilities." *Slocum v. Food Fair Stores of Florida*, 100 So.2d 396 (Fla. 1958).

   ii. **Special notice:** But again, remember that if the defendant has special notice that the plaintiff is a person of unusual sensitivity, insults by themselves might be enough to establish liability.

E. **Public utility and common carrier liability:** Common carriers and public utilities are held to a ***stricter standard*** of conduct than the rest of the population, with respect to the intentional infliction of emotional distress. Whereas insults, no matter how gross, will almost never be held actionable when made by an ordinary person, a utility or carrier will be liable for highly insulting language used by its employee during the course of his work. Rest. 2d, §48.

1. **Hotels:** This rule applies not only to transportation companies, and to the water and power companies that are usually thought of as "public utilities", but also to hotels. See Rest. 2d, §48. (But it has not generally been applied to ordinary

businesses which hold their doors open to the public.)

★ **Example:** P buys a ticket for the D railroad, and boards it. D's conductor, in a dispute about fares, insults P, saying that P is a lunatic, that his place is in a lunatic asylum, and that he, the conductor, would be glad to give P two black eyes if he were off duty. *Held*, ". . . The carrier is under the absolute duty of protecting his passengers from assault or insult by himself or his servants." Therefore, P may recover from D for the indignities he suffered. *Lipman v. Atlantic Coast Line Railroad Co.*, 93 S.E. 714 (S.C. 1917).

2. **Rationale:** The court in *Lipman* based its holding on the theory that P had bought a ticket, and was thus contractually entitled to respect. But other cases hold that a carrier or utility is liable for insults made to a ***prospective*** customer (e.g., one who is seeking to buy a ticket.) Thus the liability does not really seem to be based on contract, but instead on a general duty on the part of utilities, common carriers, etc., to treat the public at large with courtesy. See P,W&S, p. 60.

INTENTIONAL INTERFERENCE WITH PROPERTY

Introductory note: In this chapter, we consider various kinds of intentional interferences with the plaintiff's goods and land. We will be concerned primarily with three torts: trespass to land, trespass to chattels (i.e., goods); and conversion (the taking of goods). We will also discuss in general terms the distinction between trespass and ***nuisance***, which, as opposed to trespass, involves the plaintiff's right to the use and enjoyment of his land rather than to the exclusive possession of it.

I. TRESPASS TO LAND

A. **Definition:** A trespass to land can occur when the defendant enters the plaintiff's land, or causes another person or an object to enter the plaintiff's land.

1. **Wrongfully remaining:** Alternatively, it can occur if the defendant remains on the plaintiff's land without the right to be there, even if he initially entered rightfully.

2. **Failure to remove:** Finally, trespass can occur if the defendant fails to remove an object from the plaintiff's land which she is under a duty to remove.

B. **Intentional trespass:** In this chapter, we are concerned only about ***intentional*** forms of trespass; the requisite intent is discussed shortly below.

1. **History of trespass:** Under English common law, prior to the 19th century, liability for trespass to land was ***strict***. That is, the plaintiff did not have to show that the defendant's entry was either intentional or negligent. For instance, if the defendant cut a tree on his own property, without negligence, and the tree accidentally fell onto the plaintiff's property, the defendant was liable.

   a. **Rationale:** This strict liability for trespass to land was an historical anomaly, probably arising from the fact that the action was usually used to adjudicate title disputes. See Prosser, p. 63.

   b. **Involuntary acts not included:** But even the strict liability theory for trespass required that the defendant's act be ***voluntary***. Thus if the defendant was forcibly carried onto the plaintiff's land by third persons, he did not commit trespass, although it would have been a trespass if he had walked onto the land thinking it was his own. See *Smith v. Stone*, 82 Eng. Rep. 533 (K.B. 1647).

2. **Intent:** Today, virtually all American jurisdictions have ***rejected strict liability*** for trespass except where the defendant has been carrying out some "abnormally dangerous activity". Thus the Second Restatement, §166, provides that where

entry on land is neither intentional nor negligent, the defendant is liable only if the entry occurred pursuant to his carrying out of an "abnormally dangerous activity".

Example: D is walking along a sidewalk bordering P's land. Accidentally, and non-negligently, he slips, and falls against and breaks a plate glass window in a store that P has built on the land. D is not liable for trespass (although he probably would have been in 16th century England). See Rest. 2d, §166, Illustration 1.

a. **Requisite intent:** In this chapter, we examine only the tort of intentional trespass; negligent trespass follows the rules described in the material on negligence generally (*infra*, p. 75); strict liability from abnormally dangerous activity is treated *infra*, p. 252.

C. **Kind of intent required:** As with the other intentional torts, the defendant can have the requisite intent even though he does not intend any ***harm*** to the plaintiff's property interest.

Example: D, a nine-year-old boy, is a member of the P Swim Club. While swimming in the pool one day, P raises a metal cover over a drain. Thinking that there is no suction at the time, he inserts a tennis ball into the drain pipe, then replaces the cover. When he returns to get the ball, it is gone. The ball enters a critical part of the pipe and causes the pool not to drain properly, which in turn forces P to close and to make repairs. P sues D for trespass. *Held*, D had the requisite intent if he intended to place the ball in the pipe, regardless of whether he intended to cause any harm, or even knew that harm might occur. The question is whether D "possessed the capability to perform the physical act intentionally without regard to knowledge of possible injurious consequences . . ." *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. App. 1960).

1. **Effect of mistake:** If the defendant has the intent to commit a physical contact with the plaintiff's land, he will have the requisite intent for trespass even if his decision to make the contact is the result of a ***mistake***. Thus if the defendant walks onto the plaintiff's land thinking that it is his own, or thinking erroneously that he is entitled to be there, he has still committed an intentional trespass.

a. **Reasonableness irrelevant:** This is true even if the defendant's mistaken belief is entirely ***reasonable***. However, if his belief is induced by the plaintiff's conduct, this may amount to an implied consent by the plaintiff — see the discussion of consent, *infra*, p. 47. See Rest. 2d, §163, §164.

D. **Damages:** At common law, the plaintiff who could show that a trespass had occurred was entitled to receive ***nominal damages*** where no actual harm occurred, whether the trespass was intentional, negligent or accidental.

★ **Example:** D enters P's land with a surveyor and chain carriers. They

survey the land, and D claims it as his own, but does not mark any trees, cut any bushes, or cause any other physical harm to the property. *Held*, P may recover against D for the trespass, even though there was no actual harm. He is entitled to nominal damages. "From every . . . entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or herbage, or as here, the shrubbery." *Dougherty v. Stepp*, 18 N.C. 371 (N.C. 1835).

1. **Modern view:** Today, only intentional trespass, the variety of trespass being discussed in this chapter, entitles the plaintiff to nominal damages where no harm has occurred. See Rest. 2d, §163. Thus the *Dougherty* case, *supra*, would probably turn out the same way today, since the trespass there was intentional despite D's mistake (he intended to enter the land). But if D had been on his own land, and had negligently or accidently fallen onto P's land, P would today not recover nominal damages, and could recover only for harm he could actually prove.

E. **Scope of recovery:** Once trespass is established, the defendant is liable for virtually ***all consequences*** of the trespass, no matter how far-reaching and unpredictable. (This rule apparently still applies to cases of negligent and accidental trespass, as well as intentional trespass.)

1. **Far-reaching results:** Thus in the *Cleveland Park* case, *supra*, even if D reasonably believed that the ball would not be sucked into the pipe, and even if he had no reason to foresee that extensive repairs would be necessary, he is still fully liable for these repairs.

2. **Personal injury and mental distress:** If ***personal injury*** to the possessor of the property occurs as a result of the trespass, or even injury to the possessor's family, the trespasser will be liable in full for this injury, regardless of how unpredictable it was. Some courts have even awarded the possessor and his family damages for mental distress suffered as a result of the trespass where there was no physical harm. See Prosser, pp. 67-68.

F. **Only possessor has claim:** Only the ***possessor*** of the property has the right to bring an action in trespass. Thus if the owner of an apartment building has rented it to X, and D trespasses in the building, only X, not the owner, can bring a trespass action. (The owner may sue on a modified trespass action for the injury to his right of reversion, but he will have to show actual permanent harm affecting his interest, and cannot recover nominal damages as in a normal trespass action.) See Prosser, p. 69.

1. **Possessor who is not owner:** The corollary of this rule is that one who is in possession of property that he does ***not own*** may nonetheless sue in trespass. Thus a tenant may sue, although he can recover damages only for his interest up to the end of his leased term.

2. **Vacant land:** If the land is unoccupied, the owner may sue in trespass, under the legal fiction that he is in "constructive possession" of the property.

3. **Wrongful possessor:** Even if the plaintiff's possession is ***wrongful*** because

someone else owns the property, he can sue any third person who enters it.

a. **Suit by rightful owner:** And once the wrongful possessor has held the property for an appreciable period of time, and has a "colorable" (ie., not completely absurd) claim of ownership, the rightful owner cannot sue *him* in trespass. Instead, the owner must bring the common law action of ejectment, or its statutory equivalent. Prosser, p. 69.

G. **Indirect invasions:** If the defendant causes a ***tangible object*** to enter the plaintiff's land, there is a trespass even though the plaintiff himself has not made the entry.

Example: D intentionally throws a pail of water against P's house, but D himself never steps on P's land. D has nonetheless committed trespass. See Rest. 2d, §158, Illustr. 3.

1. **Entry substantially certain:** It is also a trespass if the defendant does not intend to cause the entry of the object, but knows that it is substantially certain to occur. "Thus one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land . . . becomes a trespasser on the other's land." Rest. 2d, §158, Comment i.

2. **Causing entry of third person:** The defendant also trespasses if he causes a ***person*** to enter the land. Thus in *Smith v. Stone*, *supra*, the court noted that the people who had carried the defendant onto the plaintiff's land had themselves committed trespass.

3. **Blasting damage:** Under English common law, trespass existed only if the defendant ***directly*** caused the entry on the plaintiff's property. Thus if the defendant set off a blast that caused concussion or vibrations on the plaintiff's property, and these caused damages, the plaintiff could not sue in trespass.

   a. **Action on the case:** Instead, the victim of such an indirect entry had to bring an action known as ***"trespass on the case"***. The essence of this action was that the defendant had indirectly invaded the plaintiff's interest in his property. See *supra*, p. 2. There were some important differences between an action in pure trespass, and an action in trespass on the case. For one thing, in an action "on the case", the plaintiff had to show either intention, negligence, or abnormally dangerous activity, and could not take advantage of strict trespass liability. Also, he had to prove that there was actual harm, and could not recover nominal damages.

   b. **Modern view:** Most modern courts reject the distinction between direct and indirect injury. They therefore hold that if the defendant sets off a blast that causes concussion or vibrations, the plaintiff may recover in trespass. See *Spano v. Perini Corp. supra*, p. 3. See also Prosser, p. 513. (However, since most courts no longer impose strict liability for non-negligent and non-abnormally-dangerous trespasses, the major advantage of being able to bring such a direct trespass action is lost. But the plaintiff will often be able to show that the activity was in fact abnormally dangerous and thus gave rise to strict liability.)

4. **Particles and gasses:** By the same token, most courts now hold that a defendant who has caused ***particles***, however fine, or ***gasses***, to enter the plaintiff's property, has committed trespass. The court's decision to apply a trespass rather than non-trespassory theory often has important consequences on the applicable ***statute of limitations***, as shown by the following example.

   Example: D runs an aluminum reducing plant, which causes certain gasses and particles to travel through the air and to settle on P's farm, making it unfit for raising livestock. P sues in trespass for the damage to his land and to his cattle. D contends that at most, a nuisance, not a trespass, occurred. *Held*, D has committed trespass. ". . . We may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist." Therefore, the local six-year statute of limitations for trespass, not the two-year statute applicable to nuisance, applies, and plaintiff can recover for all damages suffered during the six years prior to commencement of the suit. ***Martin v. Reynolds Metals Co.***, 342 P.2d 790 (Ore. 1959).

H. **Air space:** At common law, it was said that *"cujus est solum ejus est usque ad coelum"* — he who owns the soil owns all the way to heaven. In other words, the property owner owned the ***air space*** above the land, and he could recover in trespass against someone who put telephone wires over it, fired shots across it, or otherwise entered it.

   ★ **Example:** D hunts ducks by standing on X's land and shooting over P's land. No bullets land on P's land. *Held*, for P. D, by firing over P's land, interfered with the "quiet, undisturbed, peaceful enjoyment of the plaintiff," and committed a trespass to the land. *Herrin v. Sutterland*, 241 P. 328 (Mont. 1925).

1. **Air travel:** This theory was obviously impractical once the age of general aviation began. Property owners clearly could not be given the right to block the passage of airplanes, no matter how high above their land. Yet most courts felt that the property owner did have a right not to have planes fly overhead at extremely low altitudes, say 50 feet. In trying to set rules for just how far up the property owner's right to exclusive use of his air space goes, the courts have adopted several different solutions. The confused state of the law can be summarized as follows:

   a. **Air travel:** The U.S. Supreme Court, in *U.S. v. Causby*, 328 U.S. 256 (1946), held that federal statutes and C.A.B. regulations make the air space above the C.A.B.-prescribed minimum flight altitudes a federal and public domain. Therefore, it seems that federal law has preempted this area, and that the state courts may ***not award trespass damages*** for any flight occurring above these minimum altitudes. See Prosser, p. 72, fn. 3.

      ★ **Example:** Ps (three cities, two townships and six individuals) are located near an airport used by the Ds, various commercial airlines. The Ps sue for damages and an injunction against the flying of aircraft at low altitudes

over their land; they contend that such flights are either trespass or nuisance (see *infra*, p. 299). *Held*, for Ds. For a trespass to occur, " . . . there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above the surface." Only the "immediate reaches" of the Ps' lands are protected. There is no evidence in this case of flights low enough to meet this standard (even though there is evidence of severe noise, cracking ceilings, jangling dishes and sleepless plaintiffs). As for the nuisance claims, these cannot be litigated in federal court unless they exceed the federal jurisdictional amount (at the time of this case $3,000), which the nuisance claims do not. *City of Newark v. Eastern Airlines*, 159 F.Supp. 750 (D.N.J. 1958).

i. **Recovery for flights above minimum altitudes:** A landowner might nonetheless recover for damage caused by flights over the minimum altitude, but he probably could not do this by trespass, and might have to use a nuisance theory (described immediately below).

b. **Nuisance theory:** Even for flights occurring below federal prescribed minimum altitudes, more and more courts are rejecting traditional trespass ideas. Instead, they are permitting the landowner to recover only when he can show ***actual*** harm from the flights. To do this, the landowner will usually attempt to show that his ***use*** of the property has been curtailed (e.g., by the noise, vibrations, pollution, etc.). The basis for recovery in these cases is thus either implicitly or explicitly a ***nusiance*** theory, rather than a traditional trespass theory based on strict liability. See the discussion of nuisance *infra*, p. 287.

Example: Ps, who are landowners, sue D, an airport located near their property. They seek an injuction against any future flights from the airport over their land. *Held*, their suit must be based on nuisance, not trespass. Therefore, an injunction will be granted only if the flights unreasonably interfere with the plaintiff's use of their land, and this question of reasonableness is to be answered by weighing the plaintiffs' interest against the interest in free air travel. In making a final decision, such factors as the precise decibel levels created by the planes must be taken into account. ***Atkinson v. Bernard, Inc.***, 355 P.2d 229 (Ore. 1960).

c. **Restatement view:** The Second Restatement adopts what might be called an "implicit nuisance" approach to plane flights. §159(2) allows the plaintiff to recover in trespass for aircraft overflight only if the plane "enters into the ***immediate reaches*** of the airspace next to the land", ***and*** the flight "interferes substantially with the [plaintiff's] ***use and enjoyment*** of his land."

I. **Trespass below the surface:** The landowner may have a trespass claim if the defendant enters his land ***below*** the surface.

1. **Sub-surface mining:** However, some modern courts have begun to apply what seems like a ***nuisance*** theory to the sub-surface case, just as they have to the case of airplane flights discussed above. This has been particularly true in the oil and gas industry, as evidenced by the following example.

Example: D, a state regulatory agency, authorizes X, a landowner, to inject saltwater into X's wells so as to stimulate the production of oil and gas. P, whose land adjoins X's, argues that the saltwater will flow across the boundary, and will damage drilling operations on P's land. *Held*, the law of trespass will not be applied. Instead, the court must weigh society's interest in efficient fuel production against the interests of the plaintiff landowner. If society's interest is judged more important, the court will allow the saltwater injection program (as it did in fact in this case.) *Railroad Commission of Texas v. Manziel*, 361 S.W.2d 560 (Tex. 1962).

J. Refusal to leave as trespass: Even if the defendant had permission to enter the plaintiff's land, it will be a trespass if he refuses to ***leave*** when the permission is terminated. Similarly, if the defendant is authorized to put an object on the plaintiff's land, but then refuses or neglects to remove it when he is supposed to, there will be a trespass. See Rest. 2d, §160.

★ **Example:** P gives the D Board of Road Commissioners permission to put a snow fence on P's property parallel to a road running past P's farm. D agrees that at the end of the winter, the fence will be removed. At the end of the winter, D removes the fence, but leaves behind an anchor post. P's husband, driving a mowing machine, hits the post, is thrown to the ground, and dies. *Held*, D committed a trespass by not removing the anchor post, and is liable to P for the damages she sustained by loss of her husband. *Rogers v. Board of Road Commissioners*, 30 N.W.2d 358 (Mich. 1948).

Note: Observe that in the above example, the defendant was found to have trespassed even in the absence of a showing that its failure to remove the post had been either intentional or negligent. Apparently this rule of "strict liability" for failure to remove objects is limited to cases where there is actual harm. See PW&S, p. 81, note 5.

1. **Civil rights statutes:** Since the "refusal to leave" theory allows a property owner to sue for trespass against any permitted guest who overstays his welcome, a restaurant or hotel owner would have a cause of action for trespass against a Black who entered, demanded service, and refused to leave after service was denied. However, the 1964 Civil Rights Act, 42 U.S.C.A. §2000a, which requires all places of public accommodation involved in interstate commerce to serve customers without discrimination by race, color, etc., has been held to mean that not only may Blacks enter a public place and demand service, but they may not be sued for trespass if they refuse to leave when denied service. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

K. Continuing trespass: Where a trespass is caused by the entry of an object on the land, it is often the case that the trespass is a ***continuing*** one. That is, as long as the object is present on the land, the landowner's harm continues. When this occurs, and the property owner wants to sue, must he sue at one time for all past damages and all ***future ones*** that he might sustain if the trespass continues? Or may he bring an action for only those damages he has suffered thus far, and then bring a series of later actions for harm after the first suit?

1. **Conflicting law:** The law on this question is confused and often conflicting.

   a. **New trespass to remove:** Where the trespass is such that the defendant would have to commit a new trespass on the plaintiff's land to remove it, the courts usually hold that a single action for all past and future damages must be brought, on the ground that the defendant may not commit a second trespass to eliminate the first one, and that therefore the trespass should be viewed as permanent. This will be true, for instance, if the defendant built a house on the plaintiff's land.

   b. **Other cases:** But if the trespass is indirect (e.g. sewage from the defendant's plant flows onto the plaintiff's land), the courts have required a single suit only where the condition seems to be fairly permanent and unlikely to be abated. See Prosser, p. 75

II. TRESPASS TO CHATTELS

A. **Torts against personal property generally:** The owner of a chattel (i.e., personal property, as opposed to real estate) may have several possible tort actions against one who interferes with his use or possession of that chattel.

   1. **Negligence:** If the interference is negligent, not intentional, the plaintiff's claim would be an ordinary negligence action, and will follow the rules for such actions discussed *infra*, p. 75.

   2. **Intentional:** If the interference is intentional, the action will be for either ***trespass to chattels*** or ***conversion***, depending on the severity of the interference. If the interference is so great that it is fair to require the defendant to pay the full value of the chattel (regardless of whether it could be returned in some form to the plaintiff), the action will be for conversion; if the interference is less substantial, the action will be for trespass to chattels.

B. **Definition:** Any ***intentional interference*** with a person's ***use or possession of the chattel*** is a trespass to chattel. Thus if the defendant takes the chattel out of the plaintiff's possession (e.g., D takes P's car for a joy ride), or harms the chattel (e.g., D intentionally puts a dent in P's car), a trespass to chattels has occurred.

C. **Intent:** Trespass to chattel is, today, an exclusively intentional tort. (Negligent interference with personal property is treated according to the general rules of negligence.) However, as in the case of trespass to land, it is unnecessary that the defendant had intended to cause harm to the plaintiff's interest in his property. He must merely intend to do an act which turns out to constitute an interference.

   Example: D picks up P's book in the library, thinking it is his own. He underlines a few pages, then discovers the error, and returns the book. Although D's mistake was completely innocent, he nonetheless intended the physical act of picking up the book and marking it, and he is liable for trespass to chattels.

D. Must be actual damages: Most courts hold that a trespass to chattels occurs only where the plaintiff can prove some ***actual harm***. In other words, in contrast to the rule for trespass to land, the plaintiff is not entitled to nominal damages where he merely shows that the defendant has touched his property.

★ **Example:** P, a four-year-old girl, climbs on the back of Toby, a dog owned by D. P pulls the dog's ears, and the dog snaps at her nose. P sues for damages from the bite. D contends that under local law, P may not recover if P was a trespasser, and that P was in fact committing a trespass to chattels at the time she was bitten. *Held*, P can recover. She did not commit trespass to chattels, because there was no showing by D that the dog was harmed in any way. *Glidden v. Szybiak*, 63 A.2d 233 (N.H. 1949).

1. **Second Restatement's explanation:** The Second Restatement, §218, Comment e, explains the requirement of actual harm in the case of trespass to chattels as follows: "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermedlings with the chattel . . . Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference."

   a. **Criticism:** However, if it is true that the right to use reasonable force to protect against harmless interference is sufficient in the case of trespass to chattels, it is hard to see why this right is not also sufficient to protect against harmless trespasses to land. The requirement of actual harm in one case but not the other is probably due more to the differences in the historical development of the two torts than to any policy reasons.

2. **Loss of possession:** If the trespass to chattels is such that the plaintiff ***loses possession*** of the chattel for any time, no matter how brief, this loss of possession will be deemed to be an "actual harm", and recovery will be allowed. Some value will then be placed on the temporary loss of possession, and the result will be almost the same as if nominal damages had been allowed. See Prosser, p. 77.

E. Return of chattel: If the trespasser is still in possession of the chattel at the time suit is brought, he has the right to tender the goods to the plaintiff, in mitigation of the latter's damages. In other words, title is treated as never having left the plaintiff. This is in distinction to the tort of conversion, discussed below, as a result of which title is deemed transferred from plaintiff to defendant, and the defendant is required to pay the full value of the property.

F. Protects possessory interest: Any person in ***possession*** of the chattel may sue for trespass to chattels, even if he is not the rightful owner. In other words, the defendant is not permitted to use the defense of *"jus tertii"*, i.e., that the plaintiff has no right to sue because some third person really owns the property. The reason for this is that "The maintenance of decent order requires that peaceable possession be protected against wrongdoers with no rights at all." Prosser, p. 78.

1. **Colorable claim:** However, the plaintiff in possession must have at least a "colorable" claim to the property, i.e., a claim that is not completely absurd. Thus Prosser suggests that a thief would not be allowed to recover. Prosser, p. 78, fn. 62.
2. **Non-possessor:** A person who ***owns*** goods but who is ***not in possession*** of them at the time of the trespass may also sue. This is true whether he is entitled to the goods immediately upon request (e.g., a bailor), or only to possession at some future time (e.g., a lessor). However, in the latter case the owner may sue only for the damages done to his future possessory interest.

   Example: Ace Car Leasing leases a car for a two-year period to Lessee. D takes the car for a one-day joy ride, and then returns it unharmed. Lessee could sue for the damage to his possessory interest, even though he is not the owner of the car. Ace, however, could sue only for the damage to its future possessory interest, which in this case would probably be nothing.

III. CONVERSION

A. Introduction: The tort of conversion occurs when the defendant so substantially inteferes with the plaintiff's possession or ownership of property that it is fair to require the defendant to pay the property's full value.

1. **Dividing line:** The dividing line between interferences which are so serious as to constitute conversion and those which are merely enough to constitute trespass to chattels (for which only actual damages must be paid, and as to which there is no "forced sale" to the defendant) is thus a matter of degree. Most of our discussion of conversion will consist of describing where the courts have drawn this dividing line.

B. Intent: As with trespass to land and trespass to chattels, conversion is exclusively an intentional tort, but the requisite intent need not include a desire to harm the plaintiff's possessory interest. An innocent mistake by the defendant as to the ownership of goods, for instance, will not negate the existence of the required intent. (However, innocent intentions may be a factor in determining whether the interference with the plaintiff's rights is so severe as to constitute conversion; this factor is discussed below.) See Rest. 2d, §244.

Example: D, an auctioneer, receives a valuable painting from X, which he reasonably believes X owns. D sells the painting on behalf of X, but it turns out to have been owned by P. D is liable to P for conversion, notwithstanding his honest and reasonable mistake. See Rest. 2d, §244, Illustr. 4.

1. **Negligence:** But if the defendant's exercise of dominion or control of the plaintiff's property is merely negligent, not intentional, there will be no conversion. Instead, the plaintiff must sue for the tort of negligence.

Example: P deposits bonds in D Bank as collateral for a loan from the latter. D Bank negligently misplaces the bonds, and is unable to return them to P when

the loan is paid off. D has not committed conversion either by losing the bonds or by failing to return them, since it did not intentionally do either. See Rest. 2d, §224, Illustr. 1.

C. **What can be converted:** Any tangible property can be the subject of a conversion action. Furthermore, in recent years, courts have allowed an increasing number of kinds of ***intangibles*** to form the basis for conversion suits. Thus any document which embodies or is highly important to an intangible right will give rise to a conversion action if it is appropriated — this includes promissory notes, bills of lading, stock certificates, savings bank books, insurance policies, etc. See Prosser, pp. 81-82.

1. **Limitation:** But intangible rights that are not closely linked to a document have not usually been recognized as subject to conversion. Thus if the defendant collects a debt which is really due to the plaintiff, or steals the plaintiff's customers, there is no conversion (although Prosser says that there probably ought to be — see Prosser, p. 82). Instead, the wronged party must resort to some other kind of tort claim, perhaps interference with contractual relations (p. 355) or interference with prospective advantage (p. 358).

D. **Character of defendant's act:** The courts consider several factors in determining whether the defendant's interference with the plaintiff's property is sufficiently great so as to justify requiring the defendant to pay the entire value of it. The Second Restatement lists these factors, among others:

1. **Dominion:** The extent and duration of the defendant's exercise of ***"dominion"*** or ***"control"***;

2. **Good faith:** The defendant's ***good faith***;

3. **Harm:** The ***harm*** done to the property; and

4. **Inconvenience:** The ***inconvenience*** and ***expense*** caused to the plaintiff. See Rest. 2d, §222A.

   a. **Blending of factors:** In many cases, some of these factors will indicate that conversion should be found, but others will indicate the contrary. The issue is inevitably a relatively imprecise one, but the following examples, taken from the Second Restatement, will indicate how the factors might be reconciled.

      Example: D, leaving a restaurant, mistakenly picks up P's hat from the coat rack, thinking it is his own. When he gets to the sidewalk, D puts on the hat, realizes that it is not his own, and returns it to the rack. This is not a conversion, because no harm is done, the interference with P's right of control is limited, and D acted in good faith. Rest. 2d, §222A, Illustr. 1.

   Example: Same facts as above, except that D keeps the hat for three months before discovering his mistake and returning the hat. This is a conversion, due

to the substantial interference with P's use of his property; this is so despite D's complete good faith. *Ibid*, Illustr. 2.

Example: Same as above, except that as D gets to the sidewalk, the hat is blown off his head, and disappears through an open manhole. This is conversion, since P's property interest is completely destroyed, even though D acted in good faith, would otherwise have discovered and returned the hat immediately, and was not negligent in permitting it to be blown away. *Ibid*, Illustr. 3.

Example: Same as above, except that D takes P's hat knowingly, intending to steal it. As he leaves the restaurant, he sees a policeman, and immediately returns the hat. This is a conversion, notwithstanding the short interference, because of D's bad faith. *Ibid*, Illustr 4.

E. Kinds of interference: The following are a number of the ways in which a conversion may be committed:

1. **Acquiring possession:** The defendant may take ***possession*** of the property from the plaintiff. A claim for conversion thus lies against a ***thief***, or a sheriff who wrongfully levies upon property, or a con man who obtains goods by ***fraud*** (e.g., by paying with a worthless check.)

   a. **Bona fide purchaser:** Most courts hold that a ***bona fide purchaser of stolen goods*** is a converter, ***even if there is no way he could have known that they were stolen***. However, the courts of New York and a few other states hold that such a good faith purchaser is not liable for conversion if he is willing to give back the goods to the rightful owner upon demand.

      i. **Negotiable instruments:** However, all courts agree that a person who takes a ***negotiable instrument*** in good faith is not liable for conversion if it turns out to have been stolen; such a rule is necessary to protect the complete negotiability of checks, notes, etc. See Prosser, pp. 84-85.

   b. **Transfer of goods procured by fraud:** We have seen that one who obtains goods from the plaintiff by fraud is a converter. What is the status of a *bona fide* purchaser of these goods from the defrauder? Because the owner's right to get back the goods is based upon the equitable doctrine of rescission, and because a *bona fide* purchase always cuts off all equitable rights, the purchaser is ***not a converter*** in this situation. Prosser, *Ibid*.

   c. **Bailment of converted goods:** One who takes goods as a ***bailee***, for purposes of storing or transporting them, is not a converter if the goods turn out to have been stolen or lost. However, since this rule exists only to make it possible to run a parking garage, warehouse, or transportation service, it applies only where the bailee does ***not have knowledge***, at the time he accepts the goods, that someone else is entitled to them. Prosser, *Ibid*.

   d. **Agent or servant:** An agent or servant who accepts goods on behalf of his

principal or employer is treated the same as a bailee, as long as he has not negotiated the transaction whereby he takes possession. Thus a sales agent for IBM who passively accepts a typewriter from a man who says he is returning it and wants a refund would not be liable for conversion if it turned out to be stolen, but he would be liable if he unknowingly purchased a stolen typewriter from a second-hand typewriter dealer on behalf of IBM.

2. **Removal of goods:** One who ***removes goods*** from one place to another may be liable for conversion, if the removal constitutes a sufficiently serious interference with the plaintiff's right to possession and control. However, this is a question of degree, as illustrated by the following Example.

   ★ **Example:** P and D are co-owners of a house. They get into a dispute about ownership, and D enters the house, takes possession of it, and changes the locks. She also warns P that she will remove his furniture unless he does so himself; he does not respond, and she puts the goods in storage. P sues for conversion of the furniture, seeking its full value. *Held*, D's interference with P's property rights was not sufficiently severe to constitute conversion, or to justify the jury's award of the full value of the furniture.

   The court relied in part upon the fact that after the goods were put in storage, D informed P that he could obtain them by calling at her lawyer's office. The result would have been different, the court said, if P had demanded the furniture, and D had refused to make it available to him. D's interference was, however, sufficiently great to constitute trespass to chattels, since it was an "intermedling" with P's goods. The damages should not have been the full value of the furniture, but only the actual damage suffered by P by virtue of having been without the goods for the four months they were in storage. *Zaslow v. Kroenert*, 176 P.2d 1 (Cal. 1946).

   Note: Examples given in the Second Restatement indicate that there would have been a conversion in the above example if the facts had been somewhat different. Thus if the warehouse had been far away, so that P had been put to a great inconvenience and expense to reclaim the furniture, or if D had stored the goods in her own name, intending to keep them (regardless of whether P finally got the goods back), or if the goods had been destroyed in a fire in the warehouse before P was able to remove them, there would have been a conversion. See Rest. 2d, §222A, Illustrs. 5-8.

3. **Transferring the chattel:** The defendant can also commit conversion by ***transferring*** a chattel to one who is not entitled to it. Thus a messenger service which delivers a package to the wrong person, or an auctioneer who sells stolen goods, or a parking lot attendant who gives a car to an imposter, are all converters if the interference with the owner's rights is sufficiently severe.
   a. **Bailees:** ***Bailees*** receive some special protection in this area, however, as they do with respect to receipt of possession. If he delivers goods to one who is legally entitled to them (e.g., the real owner, where the bailee has received the goods from a thief), he will not be liable, even if he is acting in direct disregard of the instructions of the person who gave him the goods. Furthermore, if he received

the goods from a thief, and in good faith returns them to him without knowledge of the true owner's rights, he is not liable to the owner.

b. Notice or claim: But if the true owner demands return of the goods, the bailee must return them to him, or be liable for conversion. If the owner does not make a direct demand, but the bailee has reason to believe that the goods belong to him, he could at common law nonetheless return them to the bailor without liability; this rule seems to remain in most jurisdictions. See Prosser, p. 89.

4. **Withholding goods:** The defendant may also commit conversion by ***refusing to return goods*** to their owner. As with the other kinds of conversion, the existence of conversion will depend on the severity of the interference with the plaintiff's right to the goods.

a. Parking garage: Thus a parking garage which intentionally refuses to give the plaintiff back his car for half an hour would not be liable for conversion, but one which refused to surrender the car for a month would be. See Rest. 2d, §222A, Illustrs. 14-15. Similarly, if the garage delayed only a half hour, but the car was destroyed by fire during that period, there would be conversion, due to the substantial interference with the plaintiff's rights. *Ibid*, Illustr. 16.

i. Good faith: Once again, the defendant's good faith or bad faith may play an important role in determining whether the interference is so substantial as to give rise to conversion. Remember, however, that bad faith is not a prerequisite to liability, and that a parking garage which refuses to deliver the plaintiff's car for a month because it honestly and reasonably believes that the car belongs to someone else would nonetheless be liable. But in close cases, good or bad faith can make the difference. See *Russell-Vaughn Ford, Inc. v. Rouse*, below.

b. Dominion: If the defendant refuses to return the plaintiff's goods, it is irrelevant that the defendant is not using them for his own purposes, or that no permanent damage to them occurs, provided that the interference with the plaintiff's rights is otherwise sufficiently grave. The essence of the conversion claim is that the defendant has exercised ***dominion*** over the goods.

★ **Example:** P goes to D Car Dealer, to discuss trading in his old car for a new one. D's salesman asks P for his old car keys during inspection of the new cars, and he gives them to him. After P declines to do the trade-in, D's employees refuse to give him back his keys, and laugh at him. P is compelled to call the police department, after which the keys are returned. *Held*, D has committed conversion of P's automobile, and the jury's verdict of $5,000 must be upheld. Even though D did not make use of the car, and did not harm it, its employees' keeping of the keys constituted the exercise of dominion over the car in "defiance of plaintiff's right."

Furthermore, it is no defense that P could have obtained a second set of keys from his wife, since P is not required to "exhaust all possible means of gaining possession of a chattel which is withheld from him by the defendant . . ." And it is the entire automobile, not merely the keys, which have been converted,

since use of the entire automobile was denied to P. *Russell-Vaughn Ford, Inc. v. Rouse*, 206 So.2d 371 (Ala. 1968).

Note: This case illustrates particularly clearly the essence of a conversion action, i.e., that it is a ***forced sale*** to the defendant. P was able to recover not merely his actual damages (which might have been several hundreds of dollars for humiliation plus loss of time and inconvenience), but the full value of the car. Presumably, upon paying the judgment, D would be entitled to the car.

c. **Demand:** There is generally no liability for conversion until the plaintiff has ***demanded return*** of the chattel and has been refused. The defendant is deemed to have "refused" to return the goods not only where he explicitly states that he will not surrender them, but also where he equivocates, or falsely promises to return them, or stalls for a substantial time.

i. **Intentional refusal:** It is only an ***intentional*** refusal to return the goods that gives rise to an action for conversion. If the defendant is unable to return the goods because he has lost them, the plaintiff's only remedy will be an action for negligence.

ii. **Qualified refusal:** Once the plaintiff demands return of his goods, the defendant is entitled to take a reasonable time necessary to ***check the validity*** of the plaintiff's claim, provided that he gives the reasons for not yielding immediate possession. Prosser, p. 90.

5. **Destruction or alteration of the goods:** Perhaps the clearest cases of conversion occur when the defendant destroys the goods, or alters them in some fundamental way.

Example: P stores his fur coat with D. Without D's knowledge or consent, D alters the coat by reducing its size, so that P can no longer wear it. This is a conversion. But if D had merely repaired a hole in the coat, there would not be a conversion. See Rest. 2d, §222A, Illustrs. 19 and 20.

a. **Partial alteration:** If only part of a chattel is destroyed or altered, there may not be a conversion of the whole, depending on how hard the partial alteration is to repair. Thus Prosser suggests that if the defendant removes a tire from the plaintiff's automobile, there will not be a conversion of anything except the tire itself if a replacement tire is easily available, but there will be a conversion of the entire car if the episode occurs in the middle of the desert. See Prosser, p. 92.

6. **Use of the chattel:** Conversion may occur by virtue of the defendant's ***use*** of the plaintiff's goods. Again, the existence of conversion will be a question of degree, depending on the extent of the use and the harm it causes to the goods.

Example: P lends his car to D, a dealer, in order for D to sell it. On one occasion D drives the car, on his own business, for 10 miles. This is not a

conversion. But if D drove the car 2000 miles, there would be a conversion. Rest. 2d, §222A, Illustrs. 21 and 22. Similarly, if D intended to drive the car only 10 miles, but it was seriously damaged in a collision during this trip, there would be a conversion, regardless of whether D drove negligently. Rest. 2d, §222A, Illustr. 26.

7. **Assertion of ownership:** A conversion will ***not*** be found from the mere fact that defendant ***asserts ownership*** of the goods, where he does not interfere with the plaintiff's possession or other rights. For instance, if the defendant advertises the sale of the plaintiff's car, there is no conversion. But if the defendant actually conducted the sale, and permitted his buyer to gain possession of the car for even a short time, there would be. See Prosser, p. 93.

F. Who may sue: As with trespass to chattels, a conversion action may be brought by the person who was in ***possession*** of the goods at the time the conversion occurred. And the defendant may not raise the defense that the goods really belonged to some third person, unless the defendant can show that his own right to the goods derives from this third person. In other words, the defendant may not raise the defense of *"jus tertii"*.

1. **Suit by thief:** Strictly speaking, a conversion suit might therefore even be brought by a plaintiff who had possession of the goods because he had stolen them. But as a practical matter, probably no court would find for him; one way to avoid doing so would be to impose a requirement that the plaintiff's claim must be at least "colorable". See Prosser, p. 94.

2. **Owner not in possession:** At common law, an owner who was not in possession at the time of conversion could sue only if he was entitled to "immediate" possession. Thus a bailor under an at-will bailment could sue, but a lessor of property under a two-year lease could not, if the conversion took place at the end of one year.

   a. **Present law:** However, most modern courts permit even an ***owner not entitled to immediate possession*** to sue. Not all courts term this suit one in conversion, but regardless of the name, the plaintiff is entitled to collect for the ***full value*** of his future interest in the goods. See Rest. 2d, §243.

      Example: P leases a farm to X, together with all of the personal property on it. D, X's creditor, seizes the personal property by having the sheriff levy on it, but does not offer any payment to P. D is liable to P for the full value of P's reversionary interest in the property seized (i.e., the value the property would have when returned to P at the end of the lease term.) In some jurisdictions, the suit would be formally called a conversion action, but in others it would not. See Rest. 2d, §243, Illustr. 1.

G. Return of the chattel: A conversion action is, as we have said, a ***"forced sale"***, in which the defendant is required to pay the full value of the chattels, not merely the amount of the actual harm to the chattels.

1. **Exception:** However, where the defendant has not acted in bad faith (e.g., the conversion was the result of the converter's reasonable but mistaken belief that he was entitled to the goods), the goods are undamaged, and the plaintiff has suffered no special damages from the conversion, some courts permit the defendant to ***return the goods*** to the plaintiff in ***mitigation of the damages***. In that event, the plaintiff may recover only his actual damages, which would entitle him to compensation for the temporary loss of possession, inconvenience, etc. The suit is still one for conversion in this event, and the return of the goods is really a mitigation of damages.

   a. **Not always followed:** But many, perhaps most, American courts refuse to require the plaintiff to accept return of the goods even under these compelling circumstances. See Prosser, p. 97.

DEFENSES TO INTENTIONAL TORTS

I. INTRODUCTION

A. Defenses generally: This chapter discusses the various defenses that a defendant may raise to the plaintiff's claim that an intentional tort has been committed. These defenses may be broadly grouped into two categories: (1) the defense that the plaintiff ***consented*** to the invasion of his interest; and (2) defenses that are imposed as a matter of law.

1. **Privileges:** The latter group, those imposed as a matter of law, are usually called ***privileges***. The defendant's conduct is said to be privileged where, even though he has damaged the plaintiff by committing actions which would otherwise constitute a tort, he has acted to "further an interest of such social importance that it is entitled to protection. . . ." Prosser, p. 98.

2. **Distinguish from *prima facie* case:** It is up to the defendant to affirmatively plead, and ***bear the burden of proving***, the existence of a privilege. That is, the non-existence of privilege is not an element of the plaintiff's *prima facie* case. Thus whereas the elements of the various torts examined in the previous two chapters are matters which must be affirmatively pleaded and proven by the plaintiff, the plaintiff does not bear the burden of showing that the defendant's conduct was not privileged.

3. **Consent:** The non-existence of ***consent***, on the other hand, ***is*** part of the plaintiff's *prima facie* case, at least with respect to torts against the person (assault, battery, false imprisonment and infliction of mental distress) and the tort of conversion. Therefore, it is not strictly speaking a "privilege", since that term is generally reserved for exculpatory defenses which the defendant bears the burden of raising and proving. However, consent to trespass to land is usually considered to be a true privilege, and not a part of the plaintiff's *prima facie* case. Prosser, p. 101, fn. 28.

B. Mistake: The defendant's conduct will never be privileged solely by virtue of the fact that it arose from a ***mistake***. Thus we have seen that one who intentionally enters land, in the honest and even reasonable belief that it is his own, is nonetheless liable for the intentional tort of trespass; similarly, the doctor who believes he is operating on A, and who is in fact performing unauthorized surgery on B, is liable for battery.

★ **Example:** While hunting for wolves, the Ds see P's dog, which resembles a wolf, and kill it. *Held*, the Ds are liable for the damages caused by their mistake, even though they may have been acting in good faith. *Ranson v. Kitner*, 31 Ill. App. 241 (Ill. 1888).

1. **Important factor in privileges:** However, the existence of a mistake will sometimes be an important factor in determining whether the defendant's conduct falls under one of the specific privileges discussed in this chapter. For instance, the defendant in a battery case may be able to establish that he is

protected by the privilege of self-defense, if he can show that he honestly and reasonably, although mistakenly, believed that the plaintiff intended to cause him bodily harm. The effect of mistake will be examined in the context of each of the privileges discussed below.

II. CONSENT

A. General rule on consent: Generally, if the plaintiff has consented to an intentional interference with his person or property, the defendant will not be liable for that interference. In fact, as was stated above (*supra*, p. 46), most courts take the position that as to all intentional torts except trespass to land, lack of consent is part of the plaintiff's *prima facie* case, and he must plead and prove it.

B. No operation in negligence cases: The doctrine of consent is generally of importance only in intentional tort cases. The policy behind the doctrine, that of letting the parties agree on the relationship between them to a relatively great extent, is in negligence and strict liability cases embodied by the doctrine of ***assumption of risk*** (discussed *infra* at p. 218 and p. 257).

C. Implied consent: The plaintiff's consent to an invasion of his interests may sometimes be express or explicit, as where he says "I'll be your sparring partner" (thus negating the existence of assault and battery). But the existence of consent may also be ***implied*** from the plaintiff's conduct, from custom, or from the circumstances.

1. **Objective manifestation:** If it reasonably seemed to the defendant that the plaintiff consented, consent will be held to exist ***regardless of the plaintiff's subjective state of mind***. That is, it is the ***objective manifestations*** by the plaintiff that are taken into account — that is not surprising, since defendants are not mind readers.

   a. **Manifestations:** These objective manifestations may be not only words spoken by the plaintiff, but any other conduct or even lack of conduct, by him. The test is ***whether a reasonable man in the position of the defendant would believe that the plaintiff had consented to the invasion of his interests***.

   ★ **Example:** As passengers are about to leave a ship owned by the D Ship Co. after a transatlantic voyage, they are told that they may not enter the U.S. unless they have a certificate to show that they have been vaccinated. They are also told that X, a doctor employed by D, will vaccinate anyone who wishes to have this done. P stands in line with the other passengers, and tells X that she has already been vaccinated before. He says that there is no mark and that she should be vaccinated again. She says nothing, and holds up her arm, whereupon he vaccinates her. P sues D for battery, and D claims that P consented. *Held*, for D. It reasonably appeared to X that P consented to the vaccination. Therefore, P is deemed to have consented, regardless of the actual state of her mind. "If the plaintiff's behavior was such as to indicate consent on her part, [the doctor] was justified in his act, whatever her unexpressed feelings may have been. In determining whether

she consented, he could be guided only by her overt acts and the manifestations of her feelings." *O'Brien v. Cunard S.S. Co*, 28 N.E. 266 (Mass. 1891).

2. **Real but unmanifested consent:** On the other hand, if the plaintiff ***subjectively consents***, and there is some way to prove this, the consent will be effective even though it was never manifested to the defendant. Prosser, p. 101.

   Example: "A repeatedly states to members of his own family that he would be glad to have B make use of his tennis court. A makes no such statement to B, and does nothing else to manifest his consent, and none of the members of A's family communicate the information to B. B enters A's tennis court and plays on it." A has consented to B's entry and there is no trespass. Rest. 2d, §167, Illustr. 3.

3. **Custom:** If the defendant can show that it was ***customary*** for one in the plaintiff's position to consent to a certain act by the defendant, there will be consent even if the plaintiff made no objective manifestation of consent in this particular case.

   ★ **Example:** D fishes in a small pond that is almost completely enclosed by P's farm. P sues D for trespass, and D claims that P implicitly consented. *Held*, for P. In the jurisdiction in question, it has always been customary to permit the public to fish in small ponds. Therefore, in the absence of any notification by P to the contrary, D reasonably understood the fishing to be consented to, and consent will be found. *Marsh v. Colby*, 39 Mich. 626 (1878).

4. **Inaction:** Similarly, there may be circumstances where the plaintiff's ***inaction*** by itself indicates consent. Once again, the issue is whether a reasonable man in the position of the defendant would have inferred the consent from the inaction.

   Example: D, a boy, and P, a girl, sit on a park bench together in the moonlight. D says that he is going to kiss P; P says and does nothing, and D kisses her. P will be deemed to have consented by her silence and inaction. Prosser, p. 102; Rest. 2d, §50, Illustr. 2.

D. Lack of capacity to consent: There are circumstances in which the plaintiff is clearly ***incapable*** of giving consent. This is so where he is a child, intoxicated, unconscious, etc. In such a case, any objective manifestation of consent by the plaintiff will be ineffective, at least where the defendant knows or should know that the plaintiff is not competent to give a meaningful consent. Nutshell, p. 190-1.

1. **Exception:** However, the patient's consent will be implied "as a matter of law" if all of the following factors exist:

   a. **Incapacitated:** The patient is unable to give consent, either because he is unconscious or for some other reason;

   b. **Emergency:** In order to save his ***life*** or safeguard his health, ***immediate*** action is necessary;

c. **Lack of consent not indicated:** There is no indication that he would not consent if able to; and

d. **Reasonable man:** A reasonable man would consent in the circumstances.

Example: P is run over by a train, and is carried unconscious to a hospital where D is the resident doctor. It reasonably appears to D that P will die if his foot is not immediately amputated. D performs the amputation before P regains consciousness, and without procuring the consent of a relative. P will be deemed to have consented to the surgery, because of its vital and emergency nature. Rest. 2d, §62, Illustr. 3.

2. **Consent by relative:** Even if the factors listed above are not all present, a doctor may, if the patient is unconscious or otherwise incapable of consenting, procure the consent of a ***close relative*** instead. Prosser, p. 102. Conversely, even if all these factors are met, the physician may still be under a duty to seek the consent of a close relative if one is at hand.

a. **Minor:** If the patient is a ***young child***, he will usually be held not to be capable of giving consent, and either his parents must consent, or an emergency must exist. But if the patient is a minor who is approaching the age of majority, he will be able to consent on his own, and this consent may be effective regardless of whether the parents also consent. Thus a 17 year-old girl presumably has the ability to consent to a legal abortion, despite the opposition of her parents; if so, she will not be able to sustain a battery action.

b. **Court order:** If medical care is necessary to save a child's life, and the parents ***refuse to consent*** (e.g., because they are Johovah's Witnesses), the doctor or hospital will normally be able to obtain a ***court order*** overruling the parents. But if such an order is not obtained, the doctor may be held liable (unless there was not enough time to obtain one.)

i. **Aiding child's comfort:** If the operation is not necessary to save the child's life, but is a matter of aiding his comfort, the courts are split on whether to overrule the parents. See P,W&S, p. 104, note 8.

c. **Substituted consent when no emergency exists:** As stated, a parent or guardian generally has the power to consent on behalf of a youthful minor, incompetent, etc., whether or not an immediate emergency exists. But does the parent or guardian have the right to consent to surgery that is not for the patient's benefit, but is instead for the ***benefit of some third person***? This question has arisen recently in the case of ***kidney transplants***, and has received differing answers.

Example: Richard is a 39 year-old mental incompetent, whose guardian is his sister Janice. Their sister Elaine is in need of a kidney transplant, and doctors conclude that, for several reasons, Richard is the best potential donor. Janice consents to the transplant on behalf of Richard, but a guardian *ad litem*, appointed by the court specifically for the purpose of representing Richard in this matter, contends that the operation would not

be for Richard's benefit, and that Janice does not have the power to consent for him. *Held*, a guardian must act "loyally in the best interests of his ward. . . . There is absolutely no evidence here that any interests of the ward would be served by the transplant." Therefore, Janice may not consent, and the transplant may not occur. *In Re Guardianship of Pescinski*, 226 N.W.2d 180 (Wisc. 1975).

Note: However, a Kentucky court, faced with almost exactly the same situation, did allow an incompetent's close relative (his mother) to consent to a transplant for the benefit of the incompetent's brother. There, the court relied upon the fact that the incompetent would be, to some extent, "benefited" by having his brother kept alive to visit him. *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969). As a dissent in *Pescinski, supra*, noted, this "benefit" theory was "pretty thin soup on which to base a decision as to whether or not the donee is to be permitted to live." The two decisions appear to stem from two conflicting views about whether one person's interests may be compromised to aid another's based upon the decision of a third.

E. Exceeding scope of consent: If the plaintiff does give actual consent to an invasion of his interests, the defendant will not be privileged if he goes substantially ***beyond the scope*** of that consent. That is, the plaintiff generally consents to the defendant's performing acts of a certain nature, and no others. If the defendant invades the plaintiff's interests in a way that is substantially different from that consented to, he will be liable.

Example: P, while having a few drinks at the local bar, challenges D to "step outside and put up your dukes". They go outside, and D attacks P with a knife, not with his fists. D has gone beyond the scope of P's consent, and will be liable for battery, and perhaps assault, as if consent had not been given. See Prosser, p. 103.

1. **Consent to act, not consequences:** "The consent is to the plaintiff's conduct, rather than to its consequences." Prosser, p. 103. Thus in the above example, D's conduct went beyond the scope of what was consented to, since it consisted of the use of a knife rather than a fist. But if D had used his fists, and due to P's weak heart, P had dropped dead, D would not have exceeded the scope of the consent, even though the damage clearly exceeded the scope of what P anticipated.

2. **Surgery:** The scope-of-consent issue frequently arises in cases involving surgery. As in other contexts, the rule is that the plaintiff patient's consent, if it is to one particular kind of surgery for one particular purpose, will not constitute consent to another, substantially different, surgical procedure.

   ★ **Example:** P visits D, an ear specialist. D tells P that she has a diseased right ear, and needs an operation. She consents to such an operation. After D administers the anesthetic, D decides that P's right ear is not seriously enough diseased to need surgery, but that her left ear is; he therefore operates on it, without obtaining P's specific permission for this operation. P sues for battery, and D raises the defense that she consented. *Held*, P did

not consent. No emergency threatened P's life or health. Therefore, there was a technical battery, despite the fact that the operation benefitted P. (However, a new trial should be held as to damages, since the jury's finding of $14,322.50 was excessive.) *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

Note: As the appellate court in *Mohr* noted, P's recovery would be dependent upon the extent and the nature of her injury. Although the original trial court awarded P damages in the amount of $14,322, the court in the second trial awarded her only $39, probably because little actual physical harm occurred.

a. **Desirability irrelevant:** As the *Mohr* case shows, it is irrelevant that the additional or different surgery was medically desirable. The physician (and the hospital employing him) are nonetheless liable for battery. The fact that the doctor conformed to standard medical practice by the additional surgery will not be taken into account. Furthermore, even if the patient sustained no actual injury, the court may award nominal and punitive damages. Prosser, p. 104.

b. **Emergency:** However, an ***emergency*** may justify extending the surgery beyond that consented to, just as it can justify surgery without consent in the first instance (*supra*, p. 48). The test is a balancing one, weighing the risks of waiting to bring the patient back to consciousness to obtain his consent, against the risks from the additional surgery.

Example: "A consents to a particular operation and for that purpose places himself in the hands of B, a surgeon, and submits to anesthesia. Upon opening A's body, B discovers conditions which make it necessary to extend the operation or to perform a different operation from that consented to. The conditions apparently require the new or extended operation to save A's life or to accomplish the cure desired by him, and its postponement would involve pain and distress to A out of proportion to the risk of the new operation. A reasonable man would consent to the operation if he knew of the conditions discovered by B. B performs the operation." A will be deemed to have implicitly consented to the operation, and B will not be liable. Rest. 2d, §62, Illustr. 4.

Note: Observe that by the standards of the above example, the defendant in *Mohr v. Williams*, *supra*, might have been able to establish the existence of implied consent. He could have argued that the purpose of the plaintiff's operation was to remove the latter's ear problems in general, and that postponing this until the plaintiff could be revived and her consent obtained would involve trauma and pain out of proportion to the risk of the operation. But the fact that the operation involved a completely different ear (as opposed to an adjoining organ), coupled with the fact that the defendant had had ample opportunity to examine both ears, would probably cause a court to reach the same result as the *Mohr* court did.

c. **Hospital consent forms:** The issue of consent to the scope of an operation is often academic today, since most surgery is performed in hospitals

pursuant to extremely general ***consent forms***.

i. **Vague:** However, such a generalized form may be so vague and ambiguous that it is held worthless; thus in *Rogers v. Lumbermen's Mutual Casualty Co.*, 119 So.2d 649 (La. 1960), a consent form authorizing the surgeon and anesthesiologist to "administer such treatment . . . and . . . such anesthetics as [are] found necessary to perform this operation . . ." was held to be without effect.

d. **Broad consent:** Even when no general hospital consent form is signed, courts may interpret the plaintiff's consent to an operation as being quite broad, particularly where complete diagnosis is impossible until anesthesia has been applied and the incision made.

i. **Construed as general:** Thus one court held that in such cases, unless there is proof to the contrary, the patient's consent "will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension. . . ." *Kennedy v. Parrott*, 90 S.E.2d 754 (N.C. 1956).

F. **Consent due to mistake:** Suppose the plaintiff's consent would not have been given except for the fact that he is ***mistaken*** about some material aspect of the transaction. As a general rule, such a mistake is ***not*** by itself enough to make the consent ineffective.

Example: P and D are on their first date. D, in order to induce P to go to bed with him, tells here that he doesn't have any "social diseases". P is very concerned about the risk of catching such diseases, but in reliance on D's statement, consents to sex. Unbeknownst to either P or D, D in fact has V.D., which he transmits to P. Notwithstanding the mistake, P's consent is effective, even though she would never have given it had she known the full facts. Therefore, P cannot sue for battery (although she might be able to sue for negligent misrepresentation, if she could show that D should have known that he did have V.D.)

1. **Consent known or induced by defendant:** But if the defendant knew of the plaintiff's mistake, or induced that mistake (as by lying to the plaintiff), then the mistake would vitiate the consent. Thus, in the above example, if D knew that he had V.D., and was lying to P when he said he didn't, P's consent would be ineffective, and she could sue for battery.

★ **Example:** P, a woman in labor, summons D1, a doctor, to her house to help her in child birth. To help carry certain essential items, D1 brings with him D2, who is young, unmarried, and not a doctor; these facts are known to D1 but not to P. P permits D2 to be present during the birth, and to hold her hand. *Held*, P's consent to D2's presence and contact is ineffective, because it was a mistake induced by D1's and D2's deceit. Therefore, P may recover against both. *De May v. Roberts*, 9 N.W. 146 (Mich. 1881).

a. **Collateral matter:** Even where the defendant induces the plaintiff's mistaken consent, that consent will be ineffective only if the mistake related to some ***essential*** aspect of the transaction. That is, the mistake must relate to an aspect of the invasion that makes it harmful or offensive, not to some "collateral" matter that induces the consent. See Prosser, p. 105.

Example: P consents to have intercourse with D, because D offers her what appears to be a $20.00 bill. The bill turns out to be counterfeit. P's consent is nonetheless effective, because P's mistake related to a collateral aspect of the transaction. See Rest. 2d, §57, Illustr. 1. But if D induced P to have intercourse with him by taking her through a marriage ceremony which he knew was fake and P didn't, her consent would be ineffective, since the married state of the parties would be held to go to the essence of whether the intercourse was offensive. See Rest. 2d, §55, Illustr. 2.

2. **Medical cases:** Questions of mistaken consent often arise in medical cases, where the plaintiff alleges that the defendant did not adequately ***inform him*** of the ***risks*** of the proposed treatment.

a. **Active misrepresentation:** If the physician has affirmatively misstated the existence or probability of risks, most courts hold that this is enough to render the plaintiff's consent to the treatment ineffective, and thus to permit a battery claim. Similarly, the consent will be ineffective if the doctor fails to disclose consequences that he ***knows*** will definitely follow the treatment. Prosser, p. 105-6.

b. **Non-disclosure:** But if all the doctor has done is to fail to mention the risk of consequences that may or may not follow the treatment, most courts hold that the doctor's conduct is merely ***negligent***, and that only a collateral matter is involved. Therefore, these courts do not allow a battery claim and instead treat the action as one for negligence.

i. **Consequence:** Hence, the doctor may show that his failure to disclose was ***acceptable medical practice*** in the community in which he practiced, regardless of whether full disclosure would have altered the patient's decision. The issue of "informed consent" is thus discussed more fully in the treatment of negligence, *infra*, p. 92. (Some cases even hold that the doctor's duty to disclose is not measured by standard medical practice, but rather, by what is reasonable under the circumstances.

G. **Duress:** If the plaintiff consents under ***duress***, the effectiveness of the consent will depend on the immediacy and seriousness of the duress.

1. **Immediate duress:** If the plaintiff consents to the defendant's trespass or to his own imprisonment as the result of the defendant's ***threat to use force***, the consent will be ***ineffective***. This will also be true if the consent is given only because the defendant falsely asserts that he has ***legal authority*** to commit the act (e.g., "I am going to frisk you in the name of the law"). Such consent will also be ineffective if the threat of force is directed against a member of the plaintiff's family, or against his property. Prosser, p. 106.

2. **Indirect duress:** But threats of "future", rather than "imminent" harm, and threats of "economic" duress (e.g., "I'll sue you for everything you're worth if you don't go to bed with me!") are generally ***not*** enough to render the plaintiff's consent ineffective.

H. Consent to criminal acts: If the defendant's act against the plaintiff is a ***criminal act***, the courts are split as to whether the plaintiff's consent to that act is effective.

1. **Majority rule:** Most courts, particularly in older decisions, hold that the plaintiff's consent is ***ineffective*** if the act consented to is a crime. For instance, where the plaintiff and the defendant fight with each other, these courts hold that each may recover from the other.

> **Example:** P and D insult each other, and agree to fight. P strikes the first blow, and then sues in battery for injuries he sustained in the fight. *Held* , P may recover. The fact that P struck the first blow is irrelevant where the combat is by mutual consent. Furthermore, P's consent is of no effect, because in cases of breach of the peace, public policy requires that the state not shield the defendant against civil liability. "There is some natural repugnancy to allowing damages to be recovered by a bullying blackguard who has courted a fight and has been soundly thrashed, but the law can indulge in no sentiment regarding the matter." *McNeil v. Mullin*, 79 P. 168 (Kan. 1905).
>
> **Note:** A small number of courts following the majority view recognize an exception for criminal acts which do not involve a breach of the peace. Thus these courts hold that consent to a criminal act is ***effective*** if the act consented to does ***not involve a breach of the peace*** (i.e., a woman's consent to an illegal abortion).

a. **Minority view:** But approximately eight states, and the Second Restatement, take the view that the plaintiff's consent to the defendant's criminal act is ***always effective*** even where a breach of the peace is involved. This position is expressed by the maxim, *in pari delicto potior est condition defendentis* ("In equal guilt the position of the defendant is the stronger").

★ **Example:** P and D engage in a prize fight, during which P receives a fatal blow. P's estate sues for battery. *Held*, P's consent to the fight bars his recovery. The court in reaching this conclusion quoted the First Restatement: if one who consents to a fight is allowed to recover, "he is profiting by the illegality of his conduct . . . because . . . [by being] party to the breach of the peace he gains a right of action which but for his criminal joinder therein he would not have had." *Hart v. Geysel*, 294 P. 570 (Wash. 1930).

2. **Certain class protected:** Where the legislature's purpose in making the defendant's conduct a crime is to ***protect a class of persons against their own poor judgment***, however, and the plaintiff is a member of the protected class, his consent will generally be ineffective, even in those jurisdiction that do

not follow the ***majority rule*** (i.e. jurisdictions that do ***not*** agree that the existence of a crime involving a breach of the peace is by itself enough to render the plaintiff's consent ineffective).

★ **Example:** D, a boxing promoter, puts on a boxing exhibition between P and X, without a license to do so, and without following the State Athletic Commission's rule on ring padding, fouls, etc. P, who is 18 years old, is injured during the fight, and sues D. *Held*, P's consent was not effective to bar his suit against D. The state statute making unlicensed boxing matches a crime is concerned primarily with protecting the contestants. Therefore, P is a member of the protected class, and his consent to the fight does not relieve D of liability, "regardless of what the rule may be as between the combatants". *Hudson v. Kraft*, 204 P.2d 1 (Cal. 1949).

a. **Statutory rape:** Where the defendant commits the crime of "statutory rape" (i.e., intercourse with a female below a certain age, regardless of her actual consent), the same rule applies — the woman may sue for battery, and her consent is ruled ineffective because she is a member of the class for whose protection the statutory rape statute exists. See, e.g., *Bishop v. Liston*, 199 N.W. 825 (Neb. 1924).

b. **Abortions:** Where the plaintiff consents to have the defendant perform an ***illegal abortion*** on her, the courts are split as to whether her consent is effective to bar her from bringing a battery action. Of those courts who hold that she is barred, most but not all allow her to bring an action for negligence if the operation is improperly performed. Prosser, p. 108.

i. ***Roe v. Wade***: Of course, since the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), abortions performed in the first trimester of pregnancy are no longer illegal. But as to abortions that are illegal because not performed during this trimester, and not falling into some other statutory exception, there presumably remains a split of authority about whether the patient's consent bars her from suing for battery.

III. Self Defense

A. Privilege generally: Just as the criminal law recognizes the privilege of self-defense, so does tort law. In fact, the rules concerning when the privilege of self-defense exists are virtually the same in the two contexts. See Prosser, p. 108, fn. 12.

B. Two issues: In determining whether the privilege exists, there are two questions:

1. Was the defendant privileged to use some kind of force to defend himself?; and
2. If so, was he privileged to use the degree of force that he did?

C. What may be defended against: A person is entitled to use reasonable force to prevent any threatened ***harmful or offensive bodily contact***, and any threatened ***confinement or imprisonment***.

1. **Negligent or intentional:** This is true whether the threat is ***intentionally***

imposed (i.e. a danger which if it occurs would be an assault, battery, or false imprisonment), or merely ***negligent***.

> **Example:** P, walking along a crowded street, is swinging a cane. D, walking behind him, wants to pass, but realizes that he is in danger of being hit by the cane if he does. There is no room to step in the street, and P refuses to stop swinging. D may use reasonable force to take the cane out of P's hand, in order to protect himself against being hit, even though P's conduct is negligent, and is not the product of an intent to hit him. See Rest. 2d, §64, Illustr. 2.

2. **Burden of proof:** The defendant bears the burden of proving that the privilege of self-defense existed. Prosser, pp. 108-9.

D. Apparent necessity: Self-defense may be used not only where there is a real threat of harm, but also where the defendant ***reasonably believes*** that there is one.

> **Example:** "A, a notorious desperado, has threatened to shoot B on sight. B sees A approaching him with his hand in his hip pocket. A does not see B and is putting his hand in his pocket to draw out a handkerchief. B mistakenly but reasonably believes that A is about to shoot him." B may use reasonable force to block what he thinks is an attempt to shoot him (e.g., knocking A down and perhaps, if necesssary, shooting A). Rest. 2d, §63, Illustr. 7.

1. **Contrast:** A reasonable but mistaken belief thus has a ***very different effect*** in cases of self-defense than it does in situations involving most of the *prima facie* torts discussed previously. Recall, for instance, that a person's reasonable but mistaken belief that the land he is entering is his own will not prevent him from being a trespasser, and a practical joker's reasonable mistaken belief that the butt of his joke will not find it a harmful or offensive contact will not shield him from liability for battery. This difference in the significance given to reasonable mistakes has been attributed to the importance courts attach to "self-preservation as the first law of nature." P,W&S, p. 114.

2. **Reasonableness:** But the defendant's belief that a threat exists must, as noted, be reasonable. Thus in the above example, if B were abnormally timid or paranoid, and a reasonable man in his position would not have believed that A was about to shoot him, B's use of force would not be privileged, no matter how real B's fear was.

E. Reasonable force: The defendant may use only the force reasonably required to ***protect himself*** against harm.

1. **Retaliation:** Therefore, he may not use any degree of force in ***retaliation*** for a tort already committed on him, or as a punishment.

> **Example:** P, a small boy, throws a snowball at D, hitting him in the eye and causing him severe pain. D may not use force to inflict a beating on P either as a punishment or as a warning against similar misconduct in the future. Rest. 2d, §63, Illustr. 4.

2. **Disarmed or helpless adversary:** Similarly, once the defendant's adversary is disarmed or helpless after committing an attack, the defendant may not use force against him.

3. **Words alone:** Just as ***words*** by themselves will virtually never constitute an assault (see *supra*, p. 12), so they will not by themselves justify the use of any degree of force. But when insults or threats are spoken in combination with any kind of hostile act (e.g., the raising of a fist), they may contribute to the defendant's overall belief that he is in imminent danger of physical harm, where the act by itself might not be sufficient. Prosser, p. 110.

4. **Future harm:** The defendant may not use force to avoid harm which is ***not imminent***, but future, unless it reasonably appears to him that there will not be a later chance to prevent the danger.

   Example: "A draws his sword from his scabbard and says, 'If it were not an assize time, I would run you through, but God help you when the court rises.' B immediately grapples with A and takes his sword from him, wounding him, but not severely." B was not privileged to use force against A, because the harm was a future one, and it should have appeared to A that he would have a later opportunity to defend himself. But if the confrontation had taken place in a tavern, and A had drawn his sword and said, "When you step out of this tavern tonight, I will run you through," B would have been justified in disarming A, since his ability to protect himself stepping out into the dark is limited. See Rest. 2d, §63, Illustrs. 10 and 11.

F. **Degree of force:** Just as no force may be used unless necessary to protect against an imminent harm, so only the ***degree*** of force necessary to prevent that harm may be used. If the defendant uses more force than was necessary, he will be liable for damage caused by the excess.

1. **Both sides with claims:** As a result of the rule against the use of more force than necessary, it may happen that each party to a fight has a claim against the other. Thus if A attacks B with his fists, injuring him slightly, and B defends himself by seriously wounding A with a knife, B will have a claim against A for his injuries and A will have a claim against B for the knife wounds (which would not have occurred had B limited his response to a reasonable degree of force, such as the use of his own fists).

2. **Minor assaults:** Even if a threatened harmful or offensive contact or imprisonment does not seem likely to lead to more than ***minor injury***, the person threatened may use such force as is necessary to avoid it.

   Example: P and D get into an argument. According to D's later testimony, P calls D a liar and makes an attempt to hit him with his fist. D then hits P and injures him. *Held*, D was entitled to use a reasonable degree of force (his fists) so as to prevent P's attack, even though D did not believe that he was in danger of serious bodily harm. Therefore, the trial court's jury instructions limiting the right of self-defense to cases where the defendant

believes himself in danger of great harm was incorrect. *Boston v. Muncy*, 233 P.2d 300 (Okla. 1951).

G. Deadly force: As we have seen, the general rule is that the defendant may use whatever degree of force is necessary to defend himself against imminent harmful or offensive contact. But there is an exception to this rule: the defendant may ***not*** use ***deadly force*** (i.e., force intended or likely to cause death or serious bodily injury) unless he himself is in danger of death or serious bodily harm. Rest. 2d, §§ 65 and 66. (And, of course, even where the defendant is threatened by such serious bodily harm or death, he may not use deadly force if a lesser degree of force would suffice to dispel the danger).

Example: X attacks D with his fists. D cuts X in the side with a knife, killing him. A homicide prosecution is brought against D. *Held*, D cannot claim self-defense. He was not, nor reasonably seemed to be, in danger of great bodily injury or death. Therefore, he had no right to use deadly force to repel the attack. *Commonwealth v. Drum*, 58 Pa. 9 (Penn. 1868).

Note: The result in *Drum* might be explained by the implication that since D and X were of approximately equal strength, D could have defended himself adequately just by using his own fists. But the "deadly force" rule goes even further than this — it means that even if the defendant cannot protect himself against a non-deadly attack without the use of deadly force, he may not use that force. Thus if D had been half the size of X, he would have had to submit to this beating rather than use the knife (assuming, of course, that the disparity in size did not by itself make it seem that the beating might be fatal or seriously injurious to D).

1. **"Deadly force" defined:** What constitutes "deadly force" will depend not only upon the weapon, but upon the way it is used. Thus the hand of a black-belt karate expert, if capable of breaking an adversary's neck and used with that intent, will be deadly force; conversely, the use of the butt of a gun merely to stun an opponent would not be. See Rest. 2d, §63, Comment d.

   a. **Rape:** The threat of ***rape*** or ***sodomy*** is deemed sufficiently serious that the victim may use deadly force if there is no other way to prevent the attack. Rest. 2d, §65(1)(b).

H. Retreat: The general rule, as we have seen, is that force (whether deadly or otherwise) may be used only if necessary to prevent the threatened harm. What if the threatened harm could be avoided merely by running away? The defendant's ***"duty to retreat"*** has been the subject of much debate, and the courts are split.

1. **Majority view:** Most courts, particularly in the South and far West, hold that the defendant may ***stand his ground and use deadly force against an attack, even if he could retreat with complete safety.*** Prosser, p. 111.

2. **Minority view:** But a growing minority of states (approximately 15) hold that one who is attacked must retreat if he can do so safely. Even these courts, however, do not require one who is attacked in his ***own home*** to retreat "from room to room". Prosser, *ibid.*

3. **Restatement view:** The Second Restatement requires the person who is attacked to retreat (if he can do so safely) in some situations, but not in others.

   a. **Use of non-deadly force:** The person being attacked may always refuse to retreat, if he is willing to use ***only*** non-deadly force to repel the attack. Rest. 2d, §63(2).

   b. **Deadly force:** Where the person attacked wants to use deadly force to defend himself, he may not do so if he is attacked somewhere other than his dwelling, and he could retreat to safety. If he is within his dwelling, he does not have to retreat (except that he must retreat if he is being attacked by someone who also lives in the same dwelling, e.g. a spouse). Rest. 2d, §65(2).

4. **Ordinary rules apply in dwelling:** But keep in mind that although the duty to retreat may not exist where a person is attacked in his own dwelling, the other rules regarding self-defense still apply. Thus the homeowner who is robbed at gunpoint may not shoot the robber if there is another, less deadly, way of disposing of the threat.

   a. **Prevention of crime:** But if it does appear to the homeowner that there is no way to prevent a burglary or robbery except by, say, shooting the perpetrator, he may do so ***even if he himself is not directly attacked***. This is so because deadly force may be used to ***prevent most felonies***, including those involving the breaking and entry of a residence. See Rest. 2d, §143(2).

I. **Injury to third person:** Suppose that in a situation where the defendant is entitled to use reasonable force in his self-defense, he does so, and injures an ***innocent bystander.*** In this situation, the use of force in self-defense will generally be privileged, assuming that the defendant did not act negligently.

> **Example:** D is attacked by X and Y. He defends himself by shooting at them, and hits P. *Held*, assuming that D was entitled to use deadly force to defend himself against X and Y, he is not liable to P even if P was merely an innocent bystander. *Morris v. Platt*, 32 Conn. 75 (1864).

IV. DEFENSE OF OTHERS

A. **General rule:** The common law recognized a person's right to use reasonable force to defend a member of his own family against attack. Most courts today would probably go considerably further than this, and would allow a person to use reasonable force even to protect a ***complete stranger*** against attack, if such intervention reasonably appeared necessary. See Prosser, p. 113. This view is also taken by the Second Restatement, §76.

1. **Degree of force:** The intervenor is subject to the same rules of reasonable force as the person being attacked would be. Thus the intervenor may not use deadly force to repel what appears to him to be a non-deadly attack. Similarly, he may not use a greater degree of force than appears necessary to repel the attack.

2. **Reasonable mistake:** What if an onlooker mistakenly, but reasonably, believes that A is attacking B, and uses force against A, when it turns out that B had really been the aggressor? Most courts hold that the intervenor "***steps into the shoes***" of the person he is aiding, and if it turns out that that person would not have been privileged to use force in self-defense (e.g., because that person was himself the aggressor), the intervenor has no privilege.

   Example: Two white plainclothes policemen, Briscoll and Murphy, attempt to arrest a young black, McGriff, who resists. D comes by, sees the altercation, and, believing that McGriff is being attacked, tackles Briscoll, injuring him. D is prosecuted for assault. *Held*, ". . . The right of a person to defend another ordinarily should not be greater than such person's right to defend himself." Since third degree assault, the crime with which D was charged, requires only that the blow have been intentional, and not a more culpable state of mind, D is guilty regardless of whether his mistake was reasonable. *People v. Young*, 183 N.E.2d 319 (N.Y. 1962). (New York would presumably apply a similar rule in a tort case, since the law as to defense of others, like that of self-defense, is virtually identical in the tort and criminal contexts.)

   a. **Minority view:** A minority of courts, and the Second Restatement, §76, hold that as long as the intervenor reasonably believes that the person he is aiding would have the privilege to use force in his own defense, the intervenor may use a reasonable degree of force. These courts would therefore almost certainly have reached a different result in *People v. Young*, above.

V. DEFENSE OF PROPERTY

A. General rule: There is a privilege to defend property (both land and chattels) on essentially the same basis as the right to defend oneself.

1. **Reasonable force:** The property owner may use only as much force as appears necessary to protect the property.

2. **Duty to use words:** The owner must first make a ***verbal demand*** that the intruder stop, before using force, unless it reasonably appears that violence or other harm will occur immediately, or that the request to stop will be useless. See Rest. 2d, §77(c).

B. Mistake: A ***reasonable mistake*** of fact by the property owner will have different consequences, depending on whether the mistake relates to the existence of the danger, or, instead, to the intruder's own lack of privilege.

1. **Mistake as to danger:** If the property owner mistakenly but reasonably believes that force is necessary to protect his property, his use of force will be privileged, provided that there is a real non-privileged intrusion.

   Example: D is sitting at home one night, when he sees P crawling through an open window in D's house. D mistakenly but reasonably believes that P

is armed and might commit violence; accordingly, he rushes at P without warning, throws him out of the window, and slams the window. In fact, P was unarmed, and has never committed the slightest violence during his long career as a cat burglar. D's use of force without warning is privileged, even though in reality no violence was threatened (thereby making this the kind of situation in which a warning before the use of force would ordinarily be necessary); this is so because D's mistake was as to the necessity for using force.

2. **Mistake as to intruder's privilege:** But if the property owner reasonably believes that the intruder has no right to be there, and it turns out that the intruder's presence was in fact privileged for some reason (see, e.g., the discussion of necessity, *infra*, p. 68), the property owner's use of force will ***not*** be privileged. Prosser, p. 114; Rest. 2d, §77(a).

   Example: P's boat goes adrift, and runs aground on D's beach. A storm arises, threatening to carry the boat out to sea. P enters D's land to save his boat (as he is privileged to do under the doctrine of necessity — see *infra*, p. 70). D reasonably but mistakenly believes that P is attempting to steal D's own boat. He therefore blocks P's way and knocks him down. D will be liable for his injuries to P, and for the loss of P's boat, despite the reasonableness of his mistake. This is so because D was mistaken not about the necessity of using force, but about the absence of P's own privilege to enter D's property. See Rest. 2d, §77, Illustr. 1.

C. **Deadly force:** As stated, the property owner can never use more force than reasonably appears necessary to protect the property. But even beyond this, the owner does ***not*** have a general right to use ***deadly force*** even where the intrusion can only be prevented this way.

   1. **Serious bodily harm:** Instead, the property owner may use deadly force against the intruder only if he believes that the latter will, unless he is kept out, cause ***death or serious bodily harm***.

      a. **Certain felonies:** However, the property owner may be privileged to use deadly force to ***prevent certain felonies***, namely those involving death, serious bodily harm, or the ***breaking and entering of a dwelling place***. This is really a separate privilege to prevent certain crimes, and is only indirectly related to the privilege to defend one's property. See Rest. 2d, §143(2).

      b. **Burglary:** This privilege to prevent breaking and entering crimes in dwellings means that a ***homeowner may use deadly force against a burglar***, provided that he reasonably believes that nothing short of this force will safely keep the burglar out. Most courts would probably also hold that he has the right to use such force against a burglar who has already entered, again assuming that there is no other apparent safe way of expelling him.

         i. **Limited to dwelling place:** However, this privilege to prevent

burglaries and other breaking and entering felonies (e.g., a breaking and entering occurring during the daytime, and therefore not a burglary under many state statutes) applies only in the case of ***dwelling places***.

ii. **Not applicable to trespassers:** And this privilege also does not permit the homeowner to use deadly force (e.g. a shotgun) against one who is merely a ***trespasser*** on lands belonging to the family homestead. The casual trespasser, in fact, must normally be warned before even ***non-deadly force*** is used against him.

2. **Where expulsion would injure intruder:** If the situation is one where the property owner may not use deadly force against the intruder, he may furthermore not ***eject*** the intruder if this is likely to cause him serious injury.

Example: P, a cattle buyer, makes a sales call at D's farmhouse one winter day, and is invited to stay for dinner. Afterwards, he becomes sick, and asks for permission to stay the night, but is refused. D takes him out to his sleigh, and starts the horses on the route to town. P is found the next morning along the road, nearly frozen to death, and badly frostbitten. *Held*, D is liable, because he had no privilege to expel P under such dangerous conditions. *Depue v. Flatau*, 111 N.W. 1 (Minn. 1907).

D. Mechanical devices: Property owners frequently make use of various ***mechanical devices*** to protect their property. These include barbed wire, glass shards on top of walls, vicious watchdogs, and spring guns (guns rigged mechanically to go off when the premises are entered.) The general rule regarding such devices is that the owner is privileged to use them ***only if he would be privileged to use a similar degree of force if he were present and acting himself***. Thus to the extent that the devices are likely to cause serious bodily harm, and are therefore to be considered deadly force, they may be used only to protect against serious injury to the inhabitants, or, possibly, to protect against breaking and entering felonies in a dwelling.

1. **Trespasser:** Thus if an electrified fence causes serious injury to a trespasser who has no intent to enter the house, the owner will be liable since he would not have been privileged to use such deadly force personally against the trespasser.

2. **Reasonable mistake:** And regardless of whether the property owner's intent was to protect his home against dangerous felonies (e.g. armed robbery), his right to use the mechanical device in a particular case will be measured by considering whether deadly force could have been used against ***that particular intruder***. Thus an electrified fence intended to guard only against burglary but which nonetheless severely injures a casual trespasser (not to mention a person with a privilege to enter, e.g. the postman) will give rise to liability.

3. **Spring gun case:** The most important, and widely-publicized, case involving mechanical devices is one concerning a spring gun, described in the following example.

★ **Example:** D and his wife own an unoccupied boarded-up farmhouse. Because the house has been broken into many times and robbed of various household items, D and his wife conceal a shotgun in the bedroom, and

connect it to the bedroom doorway in such a way that a person entering that room will discharge the gun. P, with a friend, breaks into the house, in order to steal some bottles and fruit jars which they think are antiques. When P enters the bedroom, the gun goes off, and part of his leg is blown away by the blast. P sues for his injuries, wins in a jury trial, and D appeals. *Held*, on appeal, D is liable. A property owner may not use deadly force to defend his property against a trespasser, unless the latter is committing a felony of violence, or is endangering human life by his act. And what a property owner may not do directly, he may not do indirectly by a spring gun or other mechanical device. *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

A dissent argued that D should be liable only if P showed that D ***intended*** to shoot anyone who entered the bedroom. The dissent contended that P had not met that burden, and that, in fact, D had testified that he was only trying to "frighten" intruders, not to shoot them.

Note: The court in *Katko* approved a jury instruction to the effect that the crime of breaking and entering is not a felony of violence, and therefore does not give rise to the owner's right to use deadly force (unless the inhabitants' safety is threatened for some other reason). This position is contrary to that of the Second Restatement, which explicitly gives a right to use deadly force to prevent the breaking and entering of a ***dwelling***. Rest. 2d, §143(2). Note, however, that the Restatement test would have led to the same result here, since the unoccupied farmhouse was not a dwelling.

Note: As stated, the dissent claimed that liability would lie only where it was shown that the property owner intended to injure intruders, not just to frighten them. However, "deadly force" is generally defined to include not only force intended to cause serious bodily injury, but also that which is ***likely*** to cause such injury, regardless of the user's intent. See Rest. 2d, §79. Therefore, it seems to have been correct to require D to show that the situation entitled him to use deadly force, a burden which he failed to meet. Also, the jury was free to believe that D knew with "substantial certainty" that injury would result, whether or not he literally intended it. See *Garratt v. Dailey*, *supra*, p. 6.

4. **Warning:** In the case of non-deadly mechanical devices, (e.g. barbed wire), most courts have held that the owner must post some kind of ***warning*** of the existence of the device, unless its use in the area is so common that it is reasonable to assume an intruder is aware that it may be present. See Prosser, p. 116; Rest. 2d, §84, Comment f.

   a. **Deadly devices:** But if a mechanical device constitutes deadly force (i.e. it is intended or likely to cause death or serious injury), and the use of the device meets the other requirements for use of deadly force, listed above, then normally no warning of the existence of the device will be required. See Rest. 2d, §85, Comment c. Thus in *Katko*, *supra*, the fact that no warning of the spring gun present was posted, seems to have had no effect on the outcome of that case.

i. **Warning not bar to liability:** But, conversely, if such a deadly device is used against an intruder against whom the owner himself could not use deadly force, the fact that a warning has been posted will not save the owner from liability.

VI. RECAPTURE OF CHATTELS

A. General right: Just as a property owner may in some circumstances have the right to use force to defend his possession of land or chattels (discusssed *supra*), so he may sometimes have the right to use force to ***regain*** possession of chattels or land taken from him by someone else. Re-entry on land is discussed *infra*, p. 67. Here, we deal only with recapture of chattels.

B. Similar to defense of possession: The right to forcibly recapture chattels is more limited than the right to defend existing possession. This is so because in one case, the owner is merely seeking to maintain the status quo, whereas in the other he is himself the aggressor, disburbing the peace. Therefore, there are several respects in which the right of recapture is circumscribed:

1. **Reasonable mistake:** If the owner reasonably but ***mistakenly*** believes that some third person has possession of the former's goods, or if he reasonably but mistakenly believes that force is necessary to retake the goods, it is he, not the third person, who must bear the consequence of his mistake, and ***no privilege will exist.*** This is somewhat different from the case of defense of property, where the property owner is not liable for a reasonable but mistaken belief that force is necessary.

   a. **Shoplifting:** However, in the case of a suspected shoplifter, a merchant may be protected against a reasonable but mistaken suspicion under certain circumstances described *infra*, p. 66.

2. **Fresh pursuit:** The privilege exists only if the property owner is in "***fresh pursuit***" to recover his property. Prosser, p. 118. If the owner waits a substantial length of time before making his attempt to get the property back (in some circumstances, probably as little as an hour), he can no longer use reasonable force to retake it, and instead must resort to the courts.

3. **Reasonable force:** The force used must be reasonable in the circumstances, and ***deadly force*** can never be used.

   a. **Resistance:** But if the wrongdoer resists the owner's attempt to get the property back, this resistance may itself give rise to the right to use deadly force in self-defense. This was the case in the *Hodgeden* case, discussed *infra*, p. 65.

4. **Wrongful taking:** The privilege exists only if the property was taken ***wrongfully*** from the owner. If the owner parts willingly with possession, and then an event occurs which gives him the right to repossession of the goods, he will generally not be able to use force to regain it.

   Example: Storekeeper sells a TV to Consumer on a chattel mortgage, with

the contract providing that Storekeeper may repossess the television if Consumer does not make the monthly payments. Consumer misses several payments, and Storekeeper attempts to break into Consumer's house to repossess the set. He has no right to do so, since the breaking-in constitutes the use of force, and since Storekeeper willingly parted with possession. (He could repossess if this could be done without "breach of the peace", but that is not the case here. See §9-503 of the UCC.)

Example: P is a bookkeeper for the Providence Warehouse Co., which is run by Ds. Fifty dollars of the company's money is lost, and is deducted from P's pay. Subsequently, one of the Ds gives P some money with which to pay other workers. P, stating that he is acting under his lawyer's advice, takes out of this money that which he believes to be due him, including the amount he had been docked. He then prepares to quit. Ds grab him and attempt to take the money; P is injured and sues. *Held*, Ds had no right to use force, because they willingly entrusted possession of the money to P, and P's claim to the money was honest even though erroneous. *Kirby v. Foster*, 22 A. 1111 (R.I. 1891).

a. ***Kirby*** case: Today the *Kirby* case, *supra*, might be held to be one in which the owner parted only with custody, not possession, of the money. If so, the defendants would be held to have the right to use reasonable force to recover the money, notwithstanding the honest and colorable nature of P's claim to it.

b. **Possession obtained by fraud:** If the wrongdoer obtains possession by ***fraud***, most courts hold that his possession is wrongful from the beginning, and that the owner, if he discovers the fraud promptly, may use reasonble force to recover possession.

★ **Example:** P buys a stove on credit from the Ds, by lying about his creditworthiness. The Ds discover this soon after he has taken away the stove, and go after him, overtaking him about two miles away. He refuses to give back the stove, and draws a knife to protect it. One of the Ds then forcibly holds him down, while the other takes the stove. *Held*, P gained possession of the stove fraudulently, and the Ds were therefore permitted to use reasonable force to retake the stove. *Hodgeden v. Hubbard*, 18 Vt. 504 (1846).

Note: The court in *Hodgeden* stated that the Ds had a right to retake the stove if this could be done "without breach of the peace." The court went on to say that the breach of the peace which occurred was the fault of P, and should not be blamed on the Ds. But a modern court would probably hold that where the privilege of using reasonable force existed, it could be used even if a breach of the peace was certain to occur, as long as the force was not deadly and not greater than required. See Rest. 2d, §106.

5. **Self-defense:** One who is rightfully using force to recover property always has the right to defend himself against violence with ensues. Thus in the *Hodgeden* case, the defendants would have been justified in using any amount of force, even

deadly, necessary to protect themselves against the knife. But if they could safely retreat by abandoning their attempt to get the stove, they would probably ***not*** be justified in standing their ground and using deadly force, just to protect themselves and get the stove. See Rest. 2d, §65(3)(b).

C. Detention by merchant: A merchant who thinks that a customer is shoplifting is put to a difficult choice. If he attempts to stop the customer and search or question him, he may be liable for false imprisonment or false arrest, if it turns out that no crime was committed or attempted. But the alternative, of course, is to let the customer walk away, possibly with the goods. A number of courts have aided the storekeeper in this position by granting him or his employees a privilege to ***temporarily detain*** for investigation a person who is ***reasonably suspected*** of stealing property. See Prosser, p. 122. See also Rest. 2d, §120A.

1. **Limited privilege:** The privilege is a limited one. First, the detention must be limited to a short time, generally 10 or 15 minutes or less, the time necessary to make a quick investigation.

2. **No coercion:** Also, the storekeeper or detective may not use the detention to attempt to coerce ***payment***.

3. **No arrest:** Nor may the merchant or detective purport to ***arrest*** the suspect — if he does so, the privilege terminates, and there is liability for false imprisonment and false arrest if a crime was not in fact committed.

4. **No confession:** And the storekeeper may not attempt to obtain a ***confession*** once it is determined the crime was committed.

   Example: P and her sister-in-law are shopping in the D Department Store. They falsely tell D's employees that the sister-in-law is the wife of one of the store's credit customers, and they charge goods to his account. D's detective gets suspicious, and holds the women in the store, saying that he will not let them go until they give him signed confessions. They do so, and P subsequently sues for false imprisonment. *Held*, the detective was within his rights in investigating and in demanding the return of the merchandise. But he was not privileged to coerce the women into signing a confession, when he could simply have called the police and pressed charges. Therefore, the jury should have been charged that there may have been false imprisonment. *Teel v. May Department Stores Co.*, 155 S.W.2d 74 (Mo. 1941).

5. **Off premises:** Most cases have held that the privilege of detention exists only where the suspect is stopped and detained ***on the store's premises***. Thus the Rest. 2d, §120A, in a Caveat, states that no opinion is expressed as to whether the privilege extends to one who has left the premises but is immediately nearby.

   a. **New view:** However, at least one case, as shown by the following Example, has extended this privilege to cover the area immediately around the store.

   ★ **Example:** P makes several purchases at the D Store, after which she walks towards her car in the parking lot next to the store. D's store detective stops

her en route, and motions to her to return to the store. After P returns, D accuses her of shoplifting (based on information from a third person), and demands to see the contents of her purse. P submits to the search of her purse, produces sales slips for the items she bought, and is released. She then sues for false imprisonment. *Held*, the detective had a privilege to make a reasonable detention to investigate. Furthermore, he had the right to exercise this privilege after P had left the store's premises, while she was still nearby. Such an extension was reasonable, the court stated, because "a merchant may not be able to form the reasonable belief justifying a detention for . . . investigation before a suspected person has left the premises." *Bonkowski v. Arlan's Department STore*, 162 N.W.2d 347 (Mich. 1968).

D. Entry on land: Just as an owner attempting to recover his goods may sometimes use reasonable force against the person of the wrongdoer, so he may use reasonable force to ***enter the wrongdoer's land*** to recover the missing goods.

1. **Reasonable time and manner:** The entry must be made at a ***reasonable time*** and in a ***reasonable manner***.

2. **Use of force:** The owner of the goods may use reasonable force to enter, but only if the circumstances are such that he would be allowed to use force against the landowner's person (see *supra*, p. 64).

3. **Where landowner not at fault:** But if the chattels are on another person's property through ***no fault of the latter*** (e.g. carried on by storm) the owner has only a limited privilege to enter to recover them — he may enter the land, but he is liable for any actual substantial harm which he causes. This privilege is similar to that of necessity, discussed *infra*, p. 68.

   a. **Chattel owner's fault:** However, if the goods are on the other person's land because of their ***owner's*** own fault (e.g. he negligently lets his boat drift onto his neighbor's beach) he may not enter, even if he is willing to pay for actual damage. He must instead bring a court action (usually called "replevin") to get back his property. See Rest. 2d, §200, Comment c.

VII. RE-ENTRY ON LAND

A. Privilege generally: A property ownerwho has been deprived of his possession of his ***land*** may sometimes recover it by force, just as one deprived of possession of his chattels may, as we have just seen.

B. Majority rule: The issue of recovery of real property usually arises in the case of a ***tenant who overstays his lease***, and is forcibly thrown out by his landlord. Most American courts hold that a landlord has ***no right*** to use force (whether it results in bodily harm or not) to eject a tenant. Prosser, p. 123. In states following this rule, the tenant may therefore recover for assault and battery, trespass to chattels, etc.

1. **Rationale:** The majority rule relies in part on the fact that there are almost always summary procedures permitting the landlord to use legal process to

obtain a speedy recovery of his property, thus minimizing the need for him to take matters into his own hands.

2. **Mere entry:** But states following this majority rule usually do allow the landlord to enter the property if he can do so ***without force***. And if the lease itself says that the landlord may use force to re-enter, courts which would otherwise follow the majority rule may nonetheless uphold forcible entry, provided that no more than reasonable force is used.

3. **Minority rule:** A minority of states permit the landlord, even where he is not relying on a clause in the lease, to use such force as is reasonably required to evict the tenant, provided that the force is not calculated to cause death or serious bodily harm. Prosser, *ibid.*

VIII. NECESSITY

A. Directed towards innocent person: The privileges we have examined so far are generally triggered by wrongdoing on the part of the plaintiff. For instance, it is the plaintiff's attack upon the defendant that triggers the latter's right of self-defense, the plaintiff's wrongful taking of the defendant's chattel that gives the latter the right to recapture it, etc. This being the case, it is not unreasonable to cause the plaintiff to lose his tort action, since he may be fairly said to have brought his injury upon himself. But there are situations in which the defendant is privileged, because of unusual exigencies, to harm the plaintiff, even though the plaintiff himself is completely blameless. This privilege is usually described as that of ***"necessity"***.

B. General scope: There are two categories of emergencies which may justify the defendant in harming the plaintiff's property: cases of so called "***public necessity***" and those of "***private necessity***".

1. **Single rule:** A single rule applies to both of these categories: the defendant is privileged to harm the property interest of the plaintiff where it is necessary to do so in order to prevent great harm to third persons or to the defendant himself. If the class of persons being protected is the ***public as a whole***, or a substantial number of persons, the privilege is said to be that of "public necessity". If the defendant is only protecting ***his own interests***, or those of a few private citizens, the privilege is that of "private necessity."

2. **Distinction:** The principal distinction between these two kinds of necessity is that in the "public" case, the defendant does ***not have to pay*** for the damage, whereas in the private case, he does.

C. Public necessity: The privilege of public necessity exists wherever interference with the land or chattels of another is necessary, or reasonably appears necessary, to prevent a ***disaster*** to the community, or to a substantial number of people. The following are two of the best-known cases in which this privilege has been successfully invoked.

> **Example:** In order to produce gunpowder domestically, the King enters private lands to dig for saltpetre, a crucial ingredient in its manufacture.

Held, the King is privileged to do so, since what he is doing is for defense, and thus for the benefit of the entire nation. The Commonwealth is not required to reimburse the property owner, although it is obligated to restore the property to its prior condition to the extent possible. This case is distinguishable from a case in which the King cut down private timber to be used in the palace, since there the benefit did not extend to the public at large. *The King's Prerogative in Saltpetre*, 12 Cl. 12 (Eng. 1607).

★ **Example:** A fire is raging in the houses within the immediate vicinity of P's house, and P is removing goods from it. Although the fire has already passed over P's house, D, the Fire Warden of San Francisco, determines that there is a danger that the fire will spread elsewhere, and in order to prevent this, orders P's house blown up. P sues for the damage to his property. *Held*, for D. His conduct was privileged, in order to prevent the spread of the fire. "At such times [of emergency], the individual rights of property give way to the higher laws of impending necessity." *Surocco v. Geary*, 3 Cal. 69 (1853).

1. **Act by private persons:** In the two above examples, the privileged acts were committed by public officials. But even a private individual, if he is acting on behalf of the community, may claim the privilege of public necessity.

   Example: The Ds are citizens of the town of Clarkesville, Tennessee. During the Civil War, just prior to entry of the Union Army, the Ds destroy all liquor in the town, in order to prevent the Army from becoming drunk and harming the property and residents of the town. P, one of those whose liquor was destroyed, sues. *Held*, the jury could properly have found that it reasonably appeared to the Ds necessary to destroy the liquor in order to prevent disaster to the town. Whether the Union Army was known to be "undisciplined and licentious", and accustomed to acts of "besotted vandalism", was one of the factors to be considered by the jury in determining whether public necessity existed. *Harrison v. Wisdom*, 54 Tenn. 99 (1872).

2. **Apparent necessity:** As the above example shows, the privilege will exist as long as the necessity was reasonably apparent, whether or not it in fact existed. (This is true for the privilege of private necessity, as well.) Prosser, p. 127.

3. **Compensation:** The person who injures the plaintiff's property, and successfully claims the privilege of public necessity, will never himself be required to reimburse the plaintiff for the damage suffered. And generally, the community as a whole (e.g. the state or town which benefitted) has ***not***, as a matter of common law, usually been required to ***compensate*** the victim.
   a. **Statutes:** However, several states have enacted ***statutes*** providing for compensation to the victim in a case of public necessity. Such statutes are analogous to eminent domain statutes applicable where property has been taken to build highways, public projects, etc. See Rest. 2d, §196, Comment h.

4. **Personal injury:** The privilege of public necessity is usually used to justify injury to the plaintiff's land or chattels. However, in a sufficiently compelling

case, it could also justify the infliction of injury to the ***person***. See Prosser, p. 127. But remember that as in the case of property damage, the privilege only applies where there is no other less-damaging way of combatting the danger.

D. Private necessity: The doctrine of private necessity is similar to that of public necessity. Any person is privileged to prevent injury to himself or his property, or to the person or property of a third person, by injuring private property, if there is no less-damaging way of preventing the harm.

★ **Example:** P and his family are sailing on a sloop, when a sudden storm arises. P moors at D's dock for safety. D unmoors the boat, causing it to be driven onto the shore, destroying it and injuring P and his family. P sues in trespass and also for negligence. *Held*, P had the privilege of private necessity to moor himself to D's property. Therefore, D had no right to interfere with P's exercise of this privilege, and D is thus liable for the damages his unmooring of the boat inflicted upon P. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

1. **Limited danger:** Whereas public necessity apparently only applies wher ethe danger to the community is severe, private necessity can apply even in less drastically dangerous situations. However, in determining whether the privilege exists in a particular case, the harm to the plaintiff's property interest must be weighed against the severity and likelihood of the danger that the defendant seeks to avoid. See Rest. 2d, §263, Comment d.

2. **Technical tort nullified:** Where the privilege of private necessity exists, it will be a ***complete defense*** to a tort claim where the plaintiff has suffered no actual substantial harm. Thus a claim for "technical" trespass, alleging merely that the defendant intentionally entered the plaintiff' land, and not showing any actual damages, will be defeated by the privilege of private necessity. (This is what happened in the *Ploof* case, where there was no showing that D's dock would have been harmed by the mooring.)

   a. **Actual damage:** But if the defendant causes ***actual damage*** to the plaintiff, private necessity provides only a ***limited privilege*** — the defendant has the right to interfere with the plaintiff's property rights, but he must ***pay for the damage*** he causes the plaintiff. See Prosser, p. 126; See also Rest. 2d, §263(2).

   ★ **Example:** D's boat is discharging cargo at P's dock when a storm arises. Because of the severity of the storm, D is unable to move his boat and has his employees moor it tightly to the dock. During the storm, the boat repeatedly knocks against the dock, damaging the latter. P sues D for the damage to the dock. *Held*, D had a right to use the dock to protect its property. However, it also had an obligation to compensate P for the damage caused to P, since D's act was an intentional one and the source of the danger was not an object belonging to P. "Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do

so. And so . . . necessity, in times of war or peace, may require the taking of private property . . .; but under our system of jurisprudence compensation must be made." *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910).

b. **Owner may not resist:** If the holder of the privilege of private necessity must pay for any actual damage he causes, one might wonder what the use of the privilege is in such cases. But there is one very significant use — where the privilege exists, the person whose property is being harmed has ***no right to use reasonable force*** to defeat the exercise of the privilege, and is liable for any damages he causes by using such force. See Rest. 2d, §263, Comment b. Thus in the *Vincent* case, if P had unmoored D's ship (as the dock owner in *Ploof* did), and the ship had been damaged as a result, D presumably would have had a counterclaim for this damage. And D probably would also have been justified in using reasonable force in turn to prevent P from such an unmooring.

IX. ARREST AND OTHER AUTHORITY OF LAW

A. **Generally:** Acts done under ***authority of law*** are, in general, privileged. For instance, a policeman who executes a valid arrest warrant, and uses proper procedure in doing so, of course has a defense against a false imprisonment suit by the person he arrests. (This is so even if it later turns out that the arrested person committed no crime.)

1. **Difficulties:** However, if the policeman or other official fails to use proper procedures, or enforces a purported legal order which was itself issued without jurisdiction, or there is some other flaw in the proceedings, it can be very hard to determine whether the privilege of legal authority exists. We examine here in detail only the privilege of ***arrest***, since it is this privilege that is usually at issue in intentional tort cases.

B. **Common law rules:** There are a variety of common law rules which govern the privilege of arrest. These have been changed substantially by statute in most jurisdictions, but they nonetheless furnish a general overview of the privilege.

1. **Arrest with warrant:** Where a police officer executes an arrest ***with an arrest warrant***, he will be privileged if the court has jurisdiction to issue the warrant, the warrant is "fair on its face" (i.e. is formally complete and consistent), and the officer uses proper procedures in making the arrest. Many modern cass hold that the arrest will be privileged even if the court did not have jurisdiction to issue the warrant (e.g., because it was issued without probable cause). Prosser, p. 128.

a. **Mistaken identity:** Even if the warrant is completely correct, the officer will be liable if he reasonably but mistakenly arrests X when the warrant means Y. (*Ibid*). Furthermore, the officer is liable if he uses more force than is reasonably necessary to make the arrest (discussed below).

b. **Trespass ab initio:** Under the early English common law, a doctrine called

trespass ab initio provided that one who properly entered land or made an arrest, but subsequently committed a tort, was liable "from the beginning" — that is, his tort was deemed to relate back to the beginning of the encounter. See *The Six Carpenters' Case*, 77 Eng. Rep. 695 (1610).

i. **Application to arrest:** In the case of arrest, this meant that if a police officer made a valid arrest but subsequently deviated from proper procedures (e.g., by not returning the warrant to the court, or by not bringing the prisoner before a magistrate), the entire transaction would be deemed tortious, and the arrested person could sue for false imprisonment.

ii. **Present view:** Today, the doctrine of *trespass ab initio* is virtually never used except in the area of arrest. Even here, a minority of jurisdictions (and the Second Restatement of Torts, §136) have rejected the doctrine, and hold that there is no liability for the original privileged arrest. Prosser, p. 131, predicts that the doctrine is "on its way to oblivion."

2. **Arrest without warrant:** The rules governing arrest without warrant are complex, and only a few of the general principles are set forth here:

a. **Felony or breach of the peace in presence:** An ***officer*** may make a warrantless arrest for a feloy or breach of the peace which is being committed or seems about to be committed ***in his presence***. A ***citizen*** may do the same.

b. **Past felony:** Once a felony has been committed, an ***officer*** may still make a warrantless arrest, provided that he ***reasonably believes*** that the felony has been committed, and also ***reasonably believes*** that he has the right criminal. The arrest is privileged so long as he can show both of these reasonable beliefs, even if it turns out either that there was no crime or that he has arrested the wrong man.

i. **Citizen:** But a ***citizen***, on the other hand, has only a narrower privilege in the case of a past felony. His arrest is valid only if a felony has ***in fact been committed***. However, he, like the policeman, will not lose his privilege by arresting the wrong man, provided that he reasonably believed him to be the right one. Prosser, p. 132.

c. **Past breach of peace:** If there has been a past breach of peace (i.e., a non-felony involving a threat of violence or disorder, such as a threat to make a criminal assault), neither a policeman nor citizen may make a warrantless arrest, unless the breach of peace was committed in his presence, and he is in "fresh pursuit". Prosser, p. 133.

d. **Misdemeanor:** The common law rule with respect to ***misdemeanors*** not involving the breach of the peace was that neither policeman nor citizen could arrest without a warrant. However, some states have allowed an officer to arrest for such a misdemeanor if it is committed within his presence.

3. **Reasonable force:** One making an arrest may not use more force to do so than is reasonably necessary. What is "reasonable" force in various specific circumstances has been the subject of much dispute in the courts.

   a. **Prevention:** Where the arrest is made to ***prevent a felony*** which threatens human life or safety, courts have universally held that even deadly force may be used, if there appears to be no other way to prevent the crime. Where the crime does not involve such danger, however, most courts have held that deadly force may not be used, since it would be out of proportion to the severity of the offense. Prosser, p. 134.

   b. **Force to apprehend escaping felon:** Once the crime has been committed, the state's interest in ***apprehending the wrongdoer*** would seem to be less compelling than what its interest would have been in preventing the crime. Paradoxically, however, most courts have given ***greater latitude*** for the use of deadly force in apprehending an escaping felon.

      i. **Dangerous felony:** All courts, not surprisingly, agree that the arresting officer may use deadly force to apprehend one who has committed a ***felony dangerous to human life or safety***.

      ii. **Other felonies:** In the case of non-dangerous felonies (e.g. theft), although deadly force generally cannot be used to prevent the crime, most American courts have held that it may be used to apprehend the escaping criminal, if the arrest cannot be made in any other way. See, e.g., *Schumann v. McGinn*, 240 N.W.2d 525 (Minn. 1976).

      iii. **Misdemeanor:** Where the person escaping has committed only a ***misdemeanor***, all courts agree that an officer attempting to arrest him may ***not*** use deadly force. Prosser, p. 135.

C. **Privilege to use force in resisting arrest:** Just as there may be a privilege to use force in making an arrest, so there may in a few situations be a privilege to use force in ***resisting*** an ***unlawful*** arrest. However, one may never use deadly force to resist arrest, even if unlawful. And in general, the privilege to resist unlawful arrest by force has been very much curtailed in recent years. Prosser, p. 135.

X. DISCIPLINE

A. **Generally:** A person who by virtue of his job or status is charged with maintaining ***discipline*** may sometimes be privileged to use force and restraint to ensure that discipline. This is most frequently the case for ***parents***, ***teachers*** and ***military officials***.

1. **Reasonable degree of force:** Predictably, however, the rule is that the person doing the disciplining may not use more force than is reasonably necessary to maintain the discipline. To determine whether the degree of force is reasonable, the severity of the misconduct, the age, strength, sex, etc. of the person being disciplined, the motive of the discipliner, are all to be taken into account.

   Example: P, a 13 year-old-schoolboy, is engaging in horseplay at the start

of a school period. D, his teacher, sees that P has put on his schoolmate's white band gloves, and D demands that he remove them at once. P takes them off slowly, one finger at a time. D becomes enraged, repeats his command, and then starts to hit P. He hits him on both sides of the head, rupturing his eardrum. *Held*, the trial court erred in refusing to send the case to the jury. It was a question of fact for the jury whether D's conduct was reasonable. The relative lack of severity of P's misconduct, the fact that the other students were also fooling around, and the fact that D appeared to have been acting out of anger, were all factors which the jury could consider as indicating that D behaved unreasonably. And the fact that P was injured seriously and permanently is a further strong indication of D's unreasonableness. *Tinkham v. Kole*, 110 N.W.2d 258 (Iowa 1961).

XI. JUSTIFICATION

A. Justification as a "catch-all" defense: Even if the defendant's conduct does not fit within one of the conventional defenses discussed above, he may be entitled to the general defense of ***"justification"***, a "catch-all" used where there are good reasons for exculpating the defendant for what would otherwise be an intentional tort.

★ **Example:** On the last day of the school year, P, 14 years old, is a passenger on a school bus owned by D1, and driven by D2. The 65 to 70 students aboard are in a boisterous and exhuberant mood, and a number of them break windows and lights, and cause other damage to the bus. D2, after failing to restore order, bypasses several scheduled stops and takes the children to a police station. P, who did not take part in any of the destruction, sues for false imprisonment. *Held*, the Ds should have been allowed to introduce evidence of ***justification***. D2, the driver, had a duty to "take reasonable measures for the safety and protection of . . . the passengers and the property", and his conduct may have constituted such reasonable measures. *Sindle v. New York City Transit Authority*, 307 N.E.2d 245 (NY 1973).

NEGLIGENCE GENERALLY

I. INTRODUCTION

A. Distinguished from intentional torts: In the previous chapters, we have examined a number of distinct, narrowly defined "intentional" torts. We now turn to a much more broadly defined tort, that of "negligence". While a cause of action for negligence has a number of components, which will be listed and discussed below, the tort differs from intentional torts in one particular way: whereas the intentional tortfeasor generally desires to create a certain objectionable result (e.g. a harmful contact with the defendant's person), or at least knows with substantial certainty that such a result will occur, the negligent tortfeasor has no such desire, and may have in fact desperately wished to avoid the harmful result which occurred. To phrase it another way, the intentional tortfeasor's mental state is of the utmost importance, but the negligent tortfeasor's mental state is irrelevant — the essence of his tort is that his ***conduct*** (without regard to his mind) imposed an ***unreasonable risk*** upon others.

II. COMPONENTS OF CAUSE OF ACTION

A. "Negligence" has two meanings: "Negligence", used in its everyday nonlegal sense, refers to carelessness. And, as we shall see, a failure to appreciate the risks of one's own conduct is one of the components of the tort of negligence. But in addition, there are a number of other elements of the tort of negligence. The components are as follows:

1. **Duty:** A legal duty, requiring the defendant to conduct himself according to certain standards, so as to avoid unreasonable risks to others;

2. **Failure to conform:** A failure of the defendant to conform his conduct to this standard. This is the aspect of the cause of action that can by itself be thought of as "carelessness".

    a. **Significance of duty:** Most negligence cases focus on this aspect, since generally the scope of the defendant's duty is the same: to act with the care that a "reasonable man" would exercise. However, there are kinds of cases in which the defendant owes the plaintiff no duty at all, or only a very limited duty; thus a landowner generally owes a trespasser whom he is not aware of no duty of care at all. In such a circumstance, even if the plaintiff trespasser shows that the defendant was "negligent" in the sense of being careless, he will not establish a cause of action for negligence, since it will be held that the defendant was not under any duty ***not*** to be careless.

3. **Proximate cause:** The plaintiff must also show that there is a sufficiently close causal link between the defendant's act of negligence and the harm suffered by the plaintiff. This aspect of the cause of action is generally called "proximate cause" or "legal cause."

4. **Actual damage:** The plaintiff must also show that he suffered ***actual*** damage. Thus the tort of negligence is different from most of the intentional torts discussed previously (which allow a plaintiff who suffered no actual injury to generally recover purely ***nominal damages***).

5. **Freedom from contributory negligence:** In addition to the above components of the tort, ***some jurisdictions*** also require that the plaintiff prove he was free from ***contributory negligence***. The ***large majority*** of courts, however, treat contributory negligence as an ***affirmative defense*** to be raised and proven by the defendant. The subject is discussed more fully *infra*, p. 205. See Prosser, p. 416.

III. UNREASONABLE RISK

A. Imposition of risk: To demonstrate that the defendant's conduct failed to meet the duty of care imposed on him (i.e. to show the second of the components listed above), the plaintiff must show that the defendant's conduct imposed an ***unreasonable risk of harm*** on the plaintiff (or on a class of persons of whom the plaintiff is a member). Rest. 2d, §282.

1. **Not judged by results:** To make this showing, the plaintiff cannot simply show that the defendant's conduct resulted in a terrible injury to him. Rather, he must show that the defendant's conduct, viewed ***as of the time it occurred***, without the benefit of hindsight, imposed an unreasonable risk of harm. Prosser, p. 146.

★ **Example:** D, a water company, installs water mains in the street, leading to fire hydrants. Twenty-five years after D does so, a hydrant in front of P's house springs a leak caused by the expansion of freezing water, during a winter of unprecedented severity. As a result, P's house is flooded. *Held*, D's conduct was ***not*** negligent because the risk of such a heavy frost was so remote as not to be the kind of risk an ordinary prudent man would guard against in doing the work. *Blyth v. Birmingham Waterworks Co.*, 156 Eng.Rep. 1047 (1856).

a. **Inherently dangerous objects:** This "no hindsight" principle is also illustrated by cases in which ***potentially dangerous objects*** are left lying around. Some objects (e.g. a shotgun) are so dangerous that it is negligence to leave them lying around without special handling (e.g., unloading the shotgun.) But other objects pose less of a danger, and it will not be negligence to leave them around ***even if it turns out that, unexpectedly, they cause harm***. The risk is to be evaluated as it reasonably appeared before the accident.

★ **Example:** D1 leaves a golf club lying in the backyard of his house. D2, D1's 11-year-old son, swings the club in order to hit a stone, and in doing so strikes P in the jaw and chin. P sues both D1 and D2 on a negligence theory. *Held*, for D1. A golf club is not so "obviously and intrinsically dangerous" that by leaving it on the ground D1 committed negligence. But D2 was negligent in the way he swung the club. *Lubitz v. Wells*, 113 A.2d 147 (Conn. 1955).

Note: In some situations, however, it may be negligence not to anticipate the negligence of others. (See *infra* p. 87.) Thus if D1 knew that his son had a history of injuring people, the leaving of the club might have been combined with D1's lack of supervision of D2 to result in D1's liability.

B. Balancing test: As the above examples indicate, in determining whether the risk of harm from the defendant's conduct was so great as to be "unreasonable", the test is whether a "reasonable man" would have recognized the risk, and have striven to avoid it. (The attributes of such a "reasonable man" will be examined further below.) However, because it is often exceptionally difficult to tell what a reasonable man would have done in a particular situation, the courts have developed a "balancing test" as a rough guide as to whether the defendant's conduct is so risky as to involve an unreasonable threat of harm to others. The most famous formulation is that stated by Judge Learned Hand:

Liability exists if:

$$B < L \times P,$$

where B equals the burden which the defendant would have had to bear to avoid the risk, L equals the gravity of the potential injury, and P equals the probability that harm will occur from the defendant's conduct.

★ **Example:** This test was formulated by Judge Hand in a case involving the following facts: P's barge, docked at a pier, broke away from its moorings due to D's negligence in shifting the lines that moored it. D, however, argued that P was also negligent in not having an employee on board the barge, and that, according to the rules of admiralty, the damage should be divided between D and P according to their respective degrees of negligence. *Held* (on appeal), it is burdensome, to a degree, to have an employee on board at all times. However, there was wartime activity going on in the harbor, and ships coming in and out all the time. Therefore, the risk that the mooring lines would come undone, and the danger to the barge and to other ships if they did, was sufficiently great that P shold have borne the burden of supplying a watchman (unless he had some excuse for his absence) during working hours. *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

1. **Threat of serious injury:** As the Learned Hand formula implies, the more serious the potential injury, the less probable its occurrence need be before the defendant will be held to be negligent for not guarding against it. Thus if a reasonable man would realize that a potential injury, if it came to pass, would be extremely grave, there may be liability even though it was relatively unlikely that the accident would occur.

   ★ **Example:** D sells a drum of gasoline to P's employer for P's use in operating a tractor. The threads in the cap of the drum are defective, and when P tries to remove the cap, a spark is caused, which sets the gasoline on fire. P is severely burned, and sues D on a negligence theory. *Held*, for P. It is irrelevant that there may have been less than a 50-50 chance that such an accident could occur. In view of the fact that the potential harm in

question was a fire or explosion, a reasonable person in D's position would have mended the cap, since there was at least some substantial chance of an accident. *Gulf Refining Co. v. Williams*, 185 So. 234 (Miss. 1938).

C. Calculation of burden: "B" in the above equation, the burden which the defendant would incur in order to avoid the risk, is itself a function of not only the cost to him, but also the broader ***social utility*** of the conduct which he would have to forego. Hence the courts attempt, in effect, to answer the question: "Would society be better off if all defendants in the position of D were permitted to act as D did, or were instead required to change their conduct so as to avoid the kind of risk which resulted in injury to P?" Only if the answer to this question is that defendants in D's position should be required to change their conduct will the cause of action for negligence lie (assuming that the other requirements are met).

★ **Example:** D Railroad maintains a railway turntable (a rotating platform with a track for turning a locomotive) near a publicly traveled path. P, a child, discovers that the turntable is unlocked, climbs on it, and while playing on it with a group of children gets his foot caught between the rails and severed at the ankle joint. *Held*, it was negligent of D not to see that the turntable was kept locked and guarded. The business of railroading is facilitated by the use of turntables, so the public good demands that their use not be entirely outlawed, since their utility is out of proportion to the occasional injuries which result. But the burden of keeping the turntable locked is so small that the danger of not doing so outweighs this burden. Therefore, it was negligence not to lock it. *Chicago, B. & Q. Railway Co. v. Krayenbuhl*, 91 N.W. 880 (Neb.1902).

D. Alternative danger to others: In the previous example, the burden to the defendant of avoiding the risk of harm would have been an economic one. But in some situations, this burden may itself be an alternative danger of physical harm, either to the defendant or to third persons. If so, the same general rule of balancing the burdens of avoiding the risk to the plaintiff against the magnitude of that risk is applied. See Prosser, p. 149.

Example: A train owned by D railroad is approaching a crossing when the motorman sees a truck in which P is a passenger near the crossing. The motorman stops the train, but not by the quickest possible method, and there is a collision. P claims that the train could have been stopped in a shorter distance, except that this more abrupt method might have injured some of D's passengers, and that this is why the motorman did not choose it. *Held*, D owed its own passengers the duty of utmost care for their safety, and owed P only a duty of ordinary care. Therefore, the motorman made a reasonable decision in the circumstances, and D is not liable. *Lucchese v. San Francisco-Sacramento R.R.*, 289 P. 188 (Cal. 1930).

E. Restatement standard: The Second Restatement, §291, sets forth the balancing test this way: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of

the particular manner in which it is done." In more down-to-earth terms, the question is whether "the game is worth the candle." Rest. 2d, §291, Comment a.

F. Advances in technology: Courts do not function in a vacuum; as technology progresses, what was once not considered to constitute negligence may now be so considered, and vice versa. In general, the reasonableness of defendant's conduct will be measured as of the time it occurs, not the time of plaintiff's injury.

★ **Example:** As P drives his automobile onto the elevated approach of a bridge, he loses control and the car crashes through a wooden guardrail to the ground below. P and a passenger sue D, the county in which the bridge is located, contending that it was negligence not to put up a stronger guardrail. *Held*, for D. Roads must be built to accommodate the use of the automobile. It would inhibit the building of new roads and "tend to the financial ruin of the counties undertaking to maintain the old ones" if barriers must be built to hold vehicles on the road in case of an accident. *Davison v. Snohomish County*, 270 P. 422 (Wash. 1928).

Note: Forty years later the same court, in a decision based upon facts virtually identical to those of *Davison*, reversed a summary judgment for the defendant. The court held in *Bartlett v. Northern Pacific R. Co.*, 477 P.2d 735 (Wash. 1968) that because of advances in engineering and finances since *Davison*, " . . . the parties should have the opportunity of presenting their evidence as to the practicality (cost or otherwise) of guardrails . . . on dangerous roadways. . . . "

IV. THE REASONABLE MAN

A. Objective standard: The balancing test described above, for weighing burden against risk, is a very abstract one, and neither a jury nor a potential defendant can be expected to use it to evaluate conduct in most instances. Therefore, the negligence issue is usually put to the jury as: "Would a ***'reasonable man' of ordinary prudence,*** in the position of the defendant, have conducted himself as the defendant did?" This is essentially an objective standard. That is, it does not ask whether the defendant intended to behave carefully or thought he was behaving carefully. However, this hypothetical "reasonable man" does, as we shall see below, bear some of the characteristics of the actual defendant, at least to the extent of some of his physical attributes.

B. Physical characteristics: As we have said, the test for negligence is whether the defendant behaved as a reasonable man would "under the circumstances" that confronted the defendant. "The circumstances" obviously include the external facts of the case, such as the traffic conditions, speed limits, etc., which confront a motorist. Most courts have extended "the circumstances" to include the ***physical characteristics of the defendant himself***. That is, they have held that the test is whether a reasonable man with the physical attributes of the defendant would have behaved as the defendant did.

1. Blindness: This issue has arisen most frequently in cases involving blind

plaintiffs, who sue for injuries and ***against whom*** the defense of ***contributory negligence*** is asserted. (This defense, discussed below, p. 205, involves roughly the same definition of negligence, except as applied to the plaintiff's conduct.)

★ **Example:** P, a blind man, falls on a sidewalk in City D, and sues. D asserts that P was contributorily negligent, and that he had a duty to use a higher degree of care than a sighted person, in view of the greater danger of injury, and that P failed to exercise this higher degree of care. *Held*, D's contention is wrong. "The streets are for use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength and vision. The law casts upon one no greater burden of care than upon the other." However, P was required to use the same degree of care for his own safety as would an ordinary reasonable man who happened to be blind. The jury here had the right to find, as it did, that P so conducted himself. *Hill v. City of Glenwood*, 100 N.W. 522 (Iowa 1904).

Caveat: Some cases in which physically disabled persons have been found contributorily negligence appear to follow the rule advocated by the defendant in *Hill*, *supra*. Thus one case, holding that the nearly blind plaintiff was contributorily negligent in not carrying a cane, stated that he bore the burden of "conform[ing] with the standard of care 'established by law for all persons alike, whether they be sound or deficient'."*Smith v. Sneller*, 24 A.2d 61 (Penn. 1942). However the *Smith* case really seems to be holding that the plaintiff must use the same degree of care as would a reasonable man if he were blind, and that a reasonable man in the plaintiff's position here would have carried a cane — the case does ***not*** hold that a blind man must be more careful than a sighted one, in the sense of reducing the danger of injury to himself to a lower level than that which a sighted person would tolerate.

2. **Mental attributes:** The ordinary reasonable man is ***not***, however, deemed to have the particular ***mental*** characteristics as the defendant. For instance, the defendant is not absolved of negligence because he is more stupid, hot-tempered, careless or of poorer judgment than the ordinary reasonable man. Prosser, p. 152.

★ **Example:** D builds a hay rick (a device for drying hay) near the edge of his property. P is afraid that the stack will ignite, burning his nearby cottages. He repeatedly warns D, but D says he will "chance it". The hay spontaneously catches fire, and the resulting conflagration destroys P's cottages. *Held*, D is not entitled to a jury instruction that he is not negligent if he acted in good faith and according to his best judgment, and that he should not be penalized for not being of the highest intelligence. Such a standard would be "as variable as the length of the foot of each individual," and would be impossible to administer. Instead, an objective standard, the prudence of an ordinary man, must be applied. *Vaughan v. Menlove*, 132 Eng.Rep. 490 (1837).

3. **Imbecility:** However, a mental state so low that it must be considered ***imbecilic***

or moronic, and which prevents the actor from even understanding that danger exists, will usually be held to render negligence impossible. The issue has usually arisen in the case of mentally defective plaintiffs against whom contributory negligence is asserted.

★ **Example:** P is a twenty-two year old, with a mental age of less than ten years. While working on D's farm, where he has been instructed to walk behind a corn picker, he gets his arm caught in the machine and is badly injured. D asserts that P was contributorily negligent, and cannot recover. The jury finds for P, and D appeals. *Held*, the jury's verdict for P should not be overturned as a matter of law. Although there was evidence that P would have understood a direct warning not to get too close to the picker (which D never made) he was not sufficiently intelligent to understand the reason for not getting too close (i.e., because he might be injured). Therefore, the jury could find he did not appreciate the danger of being too close, and was not contributorily negligent. *Lynch v. Rosenthal*, 396 W.W.2d 272 (Mo. 1965).

a. **Restatement disagrees:** The Second Restatement, however, does ***not*** adopt the majority rule that mental deficiency may relieve a person of negligence. Rest. 2d, §283B. However, a ***child's*** mental deficiency may be taken into account. Rest. 2d, §283A. The Restatement also indicates that mental deficiency will ***not*** relieve the plaintiff from ***contributory negligence***, unless the plaintiff is a child (generally, with a chronological age of less than 16 — §283A) or is completely ***insane*** (a topic discussed below — §464, Comment g.). Thus under the Restatement view, the appellate court in *Lynch*, *supra*, should have refrained from stating that plaintiff's inability to comprehend the danger was relevant, and perhaps even should have found contributory negligence as a matter of law.

4. **Insanity:** Paradoxically, the courts have been more inclined to impose a "reasonable man" objective standard upon ***insane*** persons than upon mentally deficient ones. See Prosser, p. 153. However, recently courts have begun to hold that insane persons, whether plaintiff or defendant, are not negligent if their insane state prevented them from understanding or avoiding the danger.

★ **Example:** P, driving her car, suddenly becomes convinced that God is taking ahold of the steering wheel. As the car nears a truck, P steps on the gas "in order to become air-borne because she knew she could fly because Batman does it." She collides with the truck, driven by D, who sues P's insurance company. The verdict is for P, and D appeals. *Held*, the general rule that insanity is no defense to negligence is too broad. This rule is motivated by several policy considerations: (1) Where a loss must be borne by one of two innocent persons, the one who caused the loss should bear it; (2) Persons interested in the insane defendant's estate (if he has one) should be induced to restrain and control him; and (3) An insanity defense may lead to false claims of insanity to avoid liability. However, where the insanity strikes suddenly and without forewarning, so that the defendant has no chance of avoiding the danger, the rule that insanity is no defense is unjust.

In the present case there was some evidence that P had had similar delusions previously, and the jury could have concluded that she should have been forewarned of the danger that delusions would strike her while driving. Therefore, the verdict for P will not be overturned. *Breunig v. American Family Insurance Co.*, 173 N.W.2d 619 (Wisc. 1970).

Comment: Observe that the suit in *Breunig* was brought ***not*** against D herself, but against her insurance company; this was permitted by Wisconsin civil practice, but is not allowed in most states. It certainly seems plausible that the jury's verdict, and even the appellate court's willingness to avoid overturning it despite the new legal principles enunciated in the case, were partially due to the recognition that the insurance company would be held directly liable for the damage.

5. **Intoxication:** A defendant who is intoxicated at the time of an accident is ***not*** permitted to claim that his intoxication stripped him of his ability to comprehend and avoid the danger; he is held to the standard of conduct of a ***reasonable sober man***. Prosser, p. 154.

6. **Children:** Another exception to the general objective "reasonable man" standard is that ***children*** are not held to the level of care which would be exercised by a reasonable adult. A child must merely conform to the conduct of a "reasonable person of like ***age***, ***intelligence***, and ***experience*** under like circumstances." Rest. 2d, §283A.

   a. **Subjective:** Note that this is a somewhat subjective standard, in that if a child is less intelligent that most children of his age, he is held simply to the degree of care which a similarly unintelligent contemporary would exercise. This should be distinguished from the standard for adults, which makes no allowance for the fact that the individual is less intelligent than the average man.

   b. **Fixed chronological test discarded:** Many older cases applied an irrebuttable presumption that a child under the age of seven could not be negligent, a rebuttable presumption that one between seven and fourteen was not negligent, and a rebuttable one that a child between fourteen and twnety-one was capable of negligence. However, the arbitrary divisions stem more from the Bible than from any sound judicial reasoning, and they are no longer used by most modern courts. See e.g., *Williamson v. Garland*, 402 S.W.2d 80 (Ky. 1966).

   c. **Definition of child:** This special standard is applicable only to children, not to all "minors". The Second Restatement, §283A, Comment a, notes that the test is generally for children of "tender years", and furthermore states that it has "seldom been applied to anyone over the age of sixteen. . ."

   ★ **Example:** P, a seventeen-year old, is walking along the wrong side of the road before dawn on an icy winter morning, clad in dark clothing and not carrying a light. D, driving her car, does not see P until it is too late and hits her. P sues, and D alleges that P was contributorily negligent. *Held*, P made no showing at trial that she was any less able to understand the

danger in what she did than a normal adult would have been, and in view of her closeness to the age of majority, the adult standard of care will be applied to her (and the jury's finding for D is upheld). *Dorais v. Paquin*, 304 A.2d 369 (N.H. 1972).

d. **Adult activity:** Another exception to the special rules for children is that where a child engages in a ***potentially dangerous activity that is normally pursued by adults***, he will be held to the standard of care that a reasonable man doing that activity would exercise. See Rest. 2d, §283A, Comment c. This principle has been applied to driving a car (*Allen v. Ellis*, 380 P.2d 408 (Kan. 1963)), operating a motorboat (Dellwo v. Pearson, 107 N.W.2d 859 (Minn. 1961)), and even to playing golf (*Newmann v. Shlansky*, 312 N.Y.S.2d 957 (N.Y. 1970)). See Prosser, pp. 156-7.

i. **Dangerousness not sufficient:** But the mere fact that the activity is ***dangerous*** is not enough to bring the child within an adult standard, if the activity is frequently engaged in by children.

★ **Example:** P and D, both teenagers, go hunting in the woods. D, thinking he sees a deer, fires his high-powered rifle. The bullet hits a tree and ricochets towards P, causing serious injury to both his eyes. P sues, and D asserts that the standard of care should be that of a reasonable minor, not a reasonable adult. *Held*, for D. D should be held to a standard of care "which a reasonably careful minor of his age and intelligence would use in similar circumstances." While deer hunting is a potentially dangerous activity, it is not one normally pursued only by adults, as evidenced by the fact that a child under 16 may even hunt without a hunting license. *Purtle v. Shelton*, 474 S.W.2d 123 (Ark. 1972).

C. **Knowledge:** Assuming that the general "reasonable man" standard is the one which applies to a case at hand, there are a number of basic issues about how a reasonable man generally behaves. One of these troublesome areas has to do with ***knowledge*** that a reasonable man would possess.

1. **Ordinary experience:** There are obviously many things which every adult has learned; these include such things as that objects will fall when dropped, that flammable materials can catch fire, that other human beings are likely to react in certain ways such as by attempting to rescue a person in danger, etc. These items of knowledge that virtually every adult in the community possesses will be imputed to the "reasonable man" and thus to the defendant. This is true whether the defendant himself actually knows the fact in question or not. Prosser, p. 158-9.

2. **Stranger to community:** Furthermore, facts generally known to all adults in a particular community will be imputed to a ***stranger*** who enters the community without having had the experience of knowledge in question. Thus a city dweller who visits a farm, and who has never learned that a bull can be dangerous, will nonetheless be held to the standard of behavior that would be exercised by one who did have such knowledge, since that knowledge is common to dwellers in rural areas. Prosser, p. 160.

3. **Duty to investigate:** Even where a certain fact is not known to members of the community at large, or to the defendant himself, he may be under a duty to end his ignorance. A driver who senses that something is wrong with his steering wheel, for instance, would have a duty to find out what the problem is before an accident is caused. Prosser, p. 160.

   ★ **Example:** As D's car is passing P's car, D has a blowout, causing a collision. There is evidence at trial that D's tires were badly worn. *Held*, D was under a duty to know of the condition of the tires (whether he in fact knew or not), and was also under a duty to know that worn tires are dangerous. *Delair v. McAdoo*, 188 A. 181 (Penn. 1936).

4. **Memory:** Just as the reasonable man knows certain facts, he also has a certain level of memory. Thus, a motorist who has passed a particular intersection many times will be charged with remembering that it is dangerous in a certain way, whereas one who never or seldom had passed that intersection before would not have the same burden. See Rest. 2d, §289, Illustr. 4.

5. **Distractions:** Similarly, the reasonable man pays attention to what he is doing, and is not ***distracted,*** unless there is a ***legitimate reason*** for such distraction. Thus, a driver who turns to look at his passenger and slams into another car would be held to have failed to behave like a reasonably prudent person.

6. **Some frailties remain:** The "reasonable man" is not, however, completely without imperfections. His care for his own safety and that of others is merely reasonable, not ***flawless.***

   Example: P, an electrical engineering student, is taken on a tour of the D power station. While pointing to a glass jar on top of a transformer at the station, he touches it, and is injured by the high tension in it. *Held*, the jury could properly find that P was free of contributory negligence. "The 'reasonable man', that standardized man to whose assumed conduct in like circumstances the plaintiff's conduct must conform, is not altogether devoid of human frailties. . . . His standardized mind may be inadvertent to conditions indicative of danger, where adequate diverting circumstances are present. On the facts of the case at bar we cannot say that the plaintiff was guilty of contributory negligence as a matter of law in failing to direct his attention to a careful study of the details of the current transformer unit before making the spontaneous and wholly natural gesture of pointing toward the glass jar mounted on top of it." *Public Service of New Hampshire v. Elliott*, 123 F.2d 2 (1st Cir. 1941).

D. Custom: In litigating the defendant's negligence, one thing that either side may point to is ***custom***, that is, the way a certain activity is habitually carried out in a trade or a community. The plaintiff may try to show that the defendant did not follow the safety-motivated custom that others in the same business follow, or the defendant may try to show that he exercised due care by using the same procedures as everyone else in the trade.

1. **Not conclusive:** The vast majority of courts allow evidence as to custom for the purpose of showing the presence or absence of reasonable care, but do not treat

this evidence as ***conclusive***. Thus, the fact that everyone else in the defendant's industry does a certain thing the same way the defendant did it does not mean that that way was not unduly dangerous, if there are other factors so indicating.

Example: Two tugboats owned by D are towing cargo owned by P. Most tugboats have not yet installed radio receiving sets, although some have; P's two tugs do not yet have these sets. They are therefore unable to receive messages that a strong storm is overtaking them, and are sunk. *Held*, the fact that most tugs have not installed sets does not conclusively establish that P was non-negligent in not having installed them. For custom is not dispositive on the issue of negligence — "a whole calling may have unduly lagged in the adoption of new and available devices. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." Here some tug owners had already installed the sets, so D's case is even weaker, and it is liable. *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

Caveat: Even though custom is not conclusive on the issue of negligence, it is nonetheless evidence on this question, and if there is no evidence in rebuttal, the fact that the defendant did or did not follow custom may be sufficient for him to prevail.

★ **Example:** P brings his car to D's service garage for repairs. In making the repairs, D stores the car in an unfenced area near the garage; while there, the car's transmission is stolen by some unknown person. P commences a negligence action against D for the value of the transmission. D introduces testimony to show that other garages in the area follow the same custom of leaving cars unguarded. *Held*, D's testimony on custom was admissible, since this is not one of those rare cases in which the custom is so clearly negligent that it ought to be excluded from consideration. Furthermore, P failed to come up with any evidence rebutting D's evidence on custom. Therefore, the trial court was correct in finding for D. *Low v. Park Price Co.*, 503 P.2d 291 (Idaho 1972).

E. Emergency: As we have seen, the general rule is that the defendant must follow the standard of care that a reasonable man would exercise "considering all of the circumstances." One of the circumstances of a particular case may be that the defendant was confronted with an ***emergency***, and was forced to act with little time for reflection. If this is so, the defendant will not be held to the same standard of care as one who has ample time for thinking about what to do; instead he must merely behave as would a reasonable man confronted with the same emergency. See Rest. 2d, §296.

★ **Example:** Cab Driver, who drives a cab for the D cab company, is suddenly accosted one day by a thug, who jumps into the cab, puts a gun to the cab driver's back, and tells him to step on it. Meanwhile, a number of pedestrians start shouting, "Stop, thief!" The thug tells Cab Driver that the latter will "suffer the loss of his brains" if he does not obey the thug's orders. Cab Driver then jams on the brakes, puts on the emergency brake,

and, leaving the motor running, jumps out. The cab keeps on rolling, and injures P.

Held, Cab Driver did not behave negligently, and D is therefore ***not*** liable (as it would be under the doctrine of *respondeat superior*, *infra*, p. 238, if Cab Driver had been negligent). "If under normal circumstances an act is done which might be considered negligent, it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication." *Cordas v. Peerless Transportation Co.*, 27 N.Y.S.2d 198 (N.Y. 1941).

1. **Emergency caused by defendant:** But if the emergency was ***caused by the defendant's negligence,*** the fact that the emergency leads the defendant into an accident will not absolve him of liability. In such a situation, it is the initial negligence leading to the emergency, ***not*** the subsequent response to the emergency, that makes the defendant negligent.

2. **Negligence still possible:** Even if the emergency is not of the defendant's own making, he must still live up to the standard of care of a reasonable man confronted with such an emergency. That is, if he behaves unreasonably, even conceding the fact that he had little time for reflection, he will nonetheless be negligent. Thus a person driving on an undivided highway who sees an accident ahead of him, and who swerves left into oncoming traffic instead of right onto a shoulder, might well be held liable notwithstanding the fact that he had little time for reflection.

3. **Minority rule:** The courts of at least one state, New Hampshire, seem to have taken the position that as long as the defendant is a generally careful person, the court will presume that his instinctive response in an emergency was non-negligent. "Carelessness means wrong thinking or failure to think in connection with action, and instinctive action, when there is not time to think, cannot of itself be called negligence." *Collette v. Boston and Maine Railroad*, 140 A. 176 (N.H. 1927).

   a. **Construction:** However, even this New Hampshire rule has sometimes been construed to allow the possibility that instinctive action in an emergency may nonetheless be unreasonable and therefore negligent. In *Whicher v. Phinney*, 124 F.2d 929 (1st Cir. 1942), a concurring opinion discussing the New Hampshire rule noted that in *Collette* (*supra*), the court held that instinctive action would be presumed to be non-negligent assuming that the defendant was "a careful person." The concurrence interpreted this to mean the instinctive action would be non-negligent only if it was not unreasonable. However, the reference to a "careful person" may really have been intended to mean that so long as the evidence suggested that in his other dealings apart from the accident, if the defendant had always been a careful person, the court would not scrutinize his action in the emergency for reasonableness, but would simply presume that it was the only action possible, and therefore non-negligent.

4. **Activity requiring special training:** There are certain activities which by their nature require an unusual capacity to react well in an emergency. In a case involving such an activity, the defendant will therefore be held to this higher standard of preparedness. A bus driver, for instance, should by his training be better prepared than the average driver to anticipate various traffic emergencies, and he will be held to this higher standard. See Rest. 2d, §296, Comment c. In fact, even the average motorist will probably be held to bear the burden of being capable of anticipating certain kinds of common emergencies (e.g., a child rushing out into the street after a ball), and will be charged with reacting more quickly in such a situation than if that kind of emergency arose less frequently. See Prosser, p. 170.

F. Anticipating conduct of others: Just as the reasonable man must possess certain knowledge, so he must possess a certain ability to ***anticipate the conduct of others.*** Following are a few kinds of responses by third persons that a defendant may be charged with the burden of anticipating:

1. **Negligence of others:** The defendant may be required to anticipate the possiblity of ***negligence*** on the part of others. Generally, this will be so only if the likelihood of injury is great, or the magnitude of the injury is very substantial. Prosser, p. 171.

   Example: An automobile driver is normally entitled to assume that other drivers will drive non-negligently. But if he has reason to know that the car ahead of him is being driven by a drunk driver, or if the road conditions are such that a short stop by the driver ahead is very likely to cause the defendant to run over a pedestrian, the defendant will be required to guard extra carefully against these consequences.

   a. **Children:** Furthermore, the defendant is charged with anticipating careless or dangerous conduct on the part of ***children***, since they are commonly known to be incapable of exercising the degree of care of the average adult. Thus one who drives down a street crowded with children playing is not entitled to assume that the children will stay out of the car's path, and he must take extra precautions to guard against their carelessness. Prosser, p. 172.

2. **Criminal and intentionally tortious acts:** The reasonable man, and hence the defendant, is normally entitled to assume that third persons will not commit ***crimes*** or ***intentional torts***, unless he has some reason to believe the contrary as to a particular third person.

   a. **Special relationship:** However, the defendant may have a ***special relationship*** with either the plaintiff or a third person, such that the defendant will bear the burden of anticipating and preventing intentionally tortious or criminal acts by that third person.

   ★ **Example:** Poddar is under the care of the Ds, university psychotherapists. He tells them that he intends to kill Tatiana, the Ps' daughter. One of the Ds asks the campus police to detain Poddar, but after he seems rational,

they release him. Neither of the Ds warns Tatiana or the Ps. Two months later, Poddar in fact kills Tatiana.

Held, the psychotherapist-patient relationship between the Ds and Poddar was sufficiently "special" that they had a duty to protect third persons such as Tatiana (with whom they had no relationship at all) from reasonably foreseeable harm by Poddar. The Ds therefore had the duty to take reasonable steps to protect her, including probably the giving of a warning to her or the Ps. The university police, on the other hand, had no special relationship to Poddar (even though they detained him) or to Tatiana; they therefore bore no duty to protect Tatiana against harm from Poddar, and the Ps' complaint as against them must be dismissed. *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976).

3. **Misrepresentation:** Just as a defendant's acts may be negligent, so his ***speech or other communication*** may be. Where the resulting injury is an abstract economic one (e.g., investors' losses due to a financial statement negligently prepared by accountants), special rules apply, generally tending to limit the defendant's liability; these are discussed in a separate section on misrepresentation, *infra*, p. 308.

   a. **Physical injury:** Where, however, a negligent statement leads to physical injury, or to tangible property damage, the case is treated under the same general rules as any other kind of negligence.

      Example: D, a truck driver, gives a hand signal to P, driving behind him, to indicate that the way is clear for P to pass D. In fact, D has carelessly failed to notice that there is an oncoming car, which P smashes into. D will be held liable for negligence. See Prosser, p. 178. See also Rest. 2d, §311, Illustr. 6.

   b. **Persons who may sue:** The person to whom the false information is given may, as we have seen, sue. Furthermore, ***third persons*** who the defendant knew or should have known might rely on the information may also sue. Thus a driver who gestures to one pedestrian to cross, and who should anticipate that other pedestrians nearby will also cross, will be liable to them if he runs them over. See Rest. 2d, §311(1)(b).

   b. **Right to rely:** However, the circumstances must be such that the plaintiff is ***reasonably justified*** in relying on the defendant's information. For instance, "There may be no reasonable justification for taking the word of a casual bystander, who does not purport to have any special information or any interest in the matter, as to the safety of a bridge or scaffold. . . ." Rest. 2d, §311, Comment c.

V. MALPRACTICE

A. Superior ability or knowledge: We have seen that the usual standard of care and knowledge is an objective one, based on the level of a hypothetical reasonable man. But what if the defendant in fact has a higher degree of knowledge, skill or experience than this reasonable man — is he charged with using that higher level, so that he will

be held liable for using, say, only the skill of an ordinary reasonable man? The answer generally is "Yes."

> **Example:** Consider the facts of *Public Service of New Hampshire v. Elliott*, *supra*, p. 84, in which the plaintiff had had extensive education about electrical construction before he electrocuted himself on the defendant's transformer. The court noted: "It may be that the plaintiff knew more than the ordinary uninstructed layman about the properties of electricity; hence the plaintiff's conduct must be judged in the light of that superior knowledge." (However, the court upheld the jury's finding of lack of contributory negligence for the reasons set forth *supra.*)

B. Malpractice generally: The issue of superior skill or knowledge arises most frequently in suits against professional persons, commonly known as ***malpractice*** suits. The general rule is that professionals, including doctors, lawyers, accountants, engineers, etc., must act with the level of skill and learning ***commonly possessed by members of the profession in good standing.*** Prosser, p. 162. There are, however, a number of more specific rules which, in practice, govern the disposition of malpractice suits.

1. **Good results not guaranteed:** The professional will ***not*** normally be held to guarantee that a ***successful result*** will occur. He is liable for malpractice only if he acted without the requisite minimum skill and competence, not merely because the operation, lawsuit, etc. was not successful.

   ★ **Example:** The Ds, lawyers, handle a suit for P against an out-of-state insurance company. They make service on the company by serving the State Insurance Commissioner. The trial judge holds that the service is valid. At that point, the Ds elect to stand by this method of service, and not to serve the defendant again by alternate means. The defendant appeals, and it is held that the service was invalid. Under local procedural rules, P is thenceforth barred from bringing a new suit against defendant, since the statute of limitations has run. P then sues the Ds for malpractice. *Held*, it was widely assumed by lawyers throughout the state that service on the Insurance Commissioner would suffice; therefore, the Ds were not negligent in failing to use an alternate form of service, even though this later turned out to have been a strategic error. A lawyer is ***not*** liable for a "***mere error of judgment***", or for a "mistake in a point of law which has not been settled by the court of last resort . . . and on which reasonable doubt may be entertained by well-informed lawyers." *Hodges v. Carter*, 80 S.E.2d 144 (N.C. 1954).

2. **Differing schools:** As a gloss upon the rule that there is no malpractice where competent professionals could differ on the proper course, cases involving doctors have held that where there are ***conflicting schools of medical thought,*** the defendant must be judged by reference to the beliefs of the ***school he follows.*** Prosser, p. 163.

   a. Caveat: However, a doctor may not set up his own individual "school." "A 'school' must be a recognized one with definite principles, and it must be the

line of thought of at least a respectable minority of the profession." Prosser, p. 163.

b. **Practical consequences:** Because of this "school of thought" rule, plaintiffs' lawyer in a medical malpractice case will frequently spend a large portion of his cross-examination of the defendant in trying to make the latter identify the proponents of his school, so that books and testimony by those proponents may be used to show the defendant's lack of adherence to that school.

c. **Chiropractors and osteopaths:** By this rationale, ***chiropractors*** and ***osteopaths*** are judged by the standards of chiropractic and osteopathy, but not by the standards of medicine at large. See Prosser, p. 163, fn. 50. This is partially due to the fact that state legislatures have afforded these procedures virtually a status of distinct professions.

3. **Specialists held to a higher standard:** Where the defendant holds himself out as a specialist in a certain portion of his profession, he will be held to the minimum standards of that specialty (which will obviously be higher than those of the profession at large). This will be true, for instance, for an opthalmologist or a tax lawyer.

4. **Need for expert testimony:** It is almost always held that the defendant professional's negligence may be shown only through ***expert testimony***. That is, in a medical malpractice case, the plaintiff must produce another doctor to testify, another accountant to establish the defendant accountant's negligence, etc. The expert testimony must normally establish both the standard course of conduct in the profession, and that the defendant departed from it.

a. **Difficult burden:** This is generally an extremely difficult burden for the plaintiff to carry, in view of professionals' notorious unwillingness to testify against each other. It is made even more difficult by the general rule that it is not enough for the expert to say that he would have handled the matter differently from the defendant; he must testify that the defendant's conduct departed from all courses of conduct accepted by some portion of the profession.

★ **Example:** D, a surgeon, sets a fracture of P's ankle by attaching the bone fragments with a metal screw. Seven years later, P returns, complaining of pain in the ankle. D inspects the ankle and bandages it, but does not make an x-ray. Two years later, P again returns to D complaining of pain, but D does nothing of consequence. Shortly thereafter, X , another physician, takes an x-ray, by which he discovers the need for surgery, performs the surgery to remove the screw, and D recovers. At the trial of P's suit against D, P's expert medical witness testifies that he would have taken an x-ray when P returned to him after seven years, but he does not state that D's failure to do so was necessarily a failure to give proper medical care. *Held*, on appeal, P failed to produce the requisite expert evidence on negligence; it is not enough that P's expert witness said he would have taken the x-ray —

what was required was an allegation that not taking it was improper medical care. *Boyce v. Brown*, 77 P.2d 455 (Ariz. 1938).

Note: The court in *Boyce* states that a doctor is "presumed to possess the degree of skill and learning which is possessed by the ***average member*** of the medical profession in good standing in the community in which he practices. . . ." But the correct standard has always been the level of skill of the ***minimally qualified member in good standing,*** not the average member. " . . . Those who have less than median or average skill may still be competent and qualified. Half of the physicians of America do not automatically become negligent in practicing medicine at all, merely because their skill is less than the professional average. On the other hand, the standard is not that of the charlatan, the quack, the unqualified or the incompetent individual who has succeeded in entering the profession or trade. It is that common to those who are recognized in the profession or trade itself as those qualified, and competent to engage in it." Rest. 2d, §299A, Comment e.

b. **Exeption where negligence obvious to layman:** If the defendant's negligence is so blatant that the court determines as a matter of law that a ***layman could identify it*** as such, expert testimony will not be needed. This would be the case, for instance, if a doctor amputates the wrong leg, injures the patient's shoulder during an appendectomy (*Ybarra v. Spangard, infra,* p. 110), etc.

i. **Layman understands obligation:** There may also be no need for expert testimony on negligence where the nature of the professional's obligation is such that a layman can understand it, and determine whether it has been met, even though its absence is not blatant.

★ **Example:** Contractor, a general contractor, hires D, an architect's firm, to supervise the construction of an airport terminal. The project encounters difficulties and P, an insurance company which has guaranteed Contractor's performance, sues D. The suit alleges that D failed to render adequate "supervision of construction." *Held*, the "supervision of construction" which D was professionally obligated to provide is something which may be understood by laymen. Therefore, even though P provided no expert testimony as to D's failure to render that supervision, the jury could correctly find that D in fact so failed. ". . . The general rule requiring expert testimony to establish a reasonable standard of professional care is necessary when issues are presented that are beyond the ordinary competence of laymen jurors, but is not necessary in passing on commonplace factual situations that the jury laymen can readily grasp and understand." *Aetna Ins. Co. v. Hellmuth, Oblata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968).

5. **Professional standard as negligence:** Although, as noted, it is generally necessary for the plaintiff to prove that the defendant failed to follow the standards of his profession, there are a few cases in which the professional standards themselves are held to be negligent, and the defendant held liable for

following them. These cases may be viewed as an application of the rule in *The T. J. Hooper*, *supra*, p. 85, that custom may be evidence of the standard of care, but it is not dispositive.

★ **Example:** P, under 40 years of age, has been a long-time patient of D1 and D2, who are opthamologists. She consults with D1, regarding her visual problems; D1 believes that P's problems are associated with her wearing of contact lenses, and treats her accordingly. Since glaucoma is very rare in people under 40, D1 does not perform a simple glaucoma test. P subsequently sues D, claiming that if such a check had been run, it would have disclosed that P had glaucoma, and her ensuing loss of vision could have been prevented. Testimony at trial indicates that the standard practice among opthalmologists is not to give such routine pressure check-ups for patients under the age of forty. *Held*, "The precaution of giving this [pressure] test . . . to patients under the age of forty is so imperative that irrespective of its disregard by the standards of the opthalmology profession, it is the duty of the courts to say what is required to protect the patients. . . ." Therefore, D is liable. *Helling v. Carey,* 519 P.2d 981 (Wash. 1974).

6. **"Standards of the community":** Until fairly recently, doctors and other professionals were almost always held to be bound by the professional standards prevailing in the ***community in which they practiced*** (or similar communities), not by a national professional standard. A reason usually cited for this rule was that education and facilities varied tremendously from place to place, and allowance should be made for the "country practitioner's" inability to keep up with his city counterpart.

   a. **Changing rule:** As professional education has become more uniform nationally, however, more and more courts have abolished the "local standards" rule; as a result, the plaintiff may now frequently fulfill his burden of producing expert testimony by calling on an expert from outside the community (who may be more willing to testify). Abolition of the local standards rule has been particularly common where the defendant is a ***specialist.***

7. **Informed consent:** In the case of a physician, one of the professional standards which must be met is that the ***risks of a proposed treatment*** must be adequately disclosed to the patient before he consents to that treatment. Older cases held that the physician's failure to make such disclosure vitiated the consent, and paved the way for a battery action (see *supra*, p. 53). More recently, however, courts have generally held that lack of full disclosure constitutes professional negligence, and that the matter must be handled under the general malpractice rules. The doctrine that adequate disclosure of risks must be made is known generally as the rule of "***informed consent***".

   a. **Professional standard:** Most courts hold that what should be disclosed to the patient is itself a question of professional standards, as to which expert testimony is necessary. The general principle is that the doctor must disclose to the patient all risks inherent in the proposed treatment which are

sufficiently ***material*** that a reasonable patient would take them into account in deciding whether to undergo the treatment, provided that the patient's ***well-being*** would not be unduly disturbed by such disclosure. Also, disclosure of other possible courses of treatment must generally be made. See *Miller v. Kennedy*, *infra*, this page.

b. **Scope of expert testimony:** Virtually all courts agree that a plaintiff suing for the physician's failure to obtain his informed consent must produce expert testimony as to the risks which were inherent in the treatment, and as to the causal link betwen the treatment and the alleged injury to the plaintiff. But many courts have recently refused to require the plaintiff to produce evidence that it is ***customary*** in the profession to make disclosure to patients in the situation in question.

★ **Example:** P consults with D, a specialist in cardiology and nephrology. D suspects that a kidney problem is the cause of P's heart disease, and recommends a kidney biopsy. D does not, however, inform P that there is a risk of the loss of a kidney from the biopsy, or that there are other ways in which the biopsy can be performed. D performs the biopsy and finds no kidney problem. But the biopsy needle damages the kidney, and it is lost. *Held*, P does not need to produce expert medical testimony that it is the custom of doctors (either in that locality or nationally) to disclose to patients the risk of loss of a kidney due to a biopsy. "The duty to warn and advise of alternatives does not arise from and is not limited by the custom of physicians. . . . Rather, it exists as a matter of law if (1) the risk of injury inherent in the treatment is material; (2) there are feasible alternative courses available; and (3) the plaintiff can be advised of the risks and alternatives without detriment to his well-being." *Miller v. Kennedy*, 522 P.2d 852 (Ct. App. Wash. 1974), aff'd 530 P.2d 334 (Wash. 1975).

i. **Contra:** But not all modern cases have agreed with *Miller* that disclosure may be necessary even where it would not be the customary practice of physicians in general to make it. See e.g., *Bly v. Rhoads*, 222 S.E. 783 (Va. 1976).

c. **Exceptions:** Of course, if there is an ***emergency*** and the patient is incapable of giving consent, disclosure will not be necessary; similarly, if the patient is exceptionally high-strung, and the doctor has reason to believe that he will overreact to any risk, and will elect a course of nontreatment which is, in reality, much more dangerous, disclosure may not be necessary.

8. **Novice:** One who is just ***beginning*** the practice of his profession (e.g., a hospital intern, a lawyer who has just passed the bar, etc.) is nonetheless ordinarily held to the same level of competence as a member of the profession generally, despite his inexperience. This is a special case of the general rule that a beginner at anything (e.g., a beginning automobile driver) may not have the benefit of a lower standard of care. "The law does not require the general public to assume the risk of the neophyte's lack of competence." Nutshell, p. 59.

a. **Assumption of risk:** However, in the facts of a particular case, the plaintiff may be found to have been aware of the defendant's inexperience, and to have consciously accepted the risk of it. Thus a lawyer who carefully tells his client that he has recently been admitted to practice and knows little about civil procedure may be entitled to some lessening of the standard of performance owed by him in pursuing the plaintiff's lawsuit. But it is hard to believe that this principle would aply to a hospital intern, even if the patient-plaintiff knew full well of the frequent incompetence of such interns.

VI. AUTOMOBILE GUEST STATUTES

A. Gross negligence and recklessness: Thus far, we have discussed what might be termed "ordinary negligence". There are a few situations, however, in which the standard for liability is not ordinary negligence but some degree of culpability beyond that; this is sometimes called ***"gross negligence"***, or ***"willful and wanton disregard"***, or ***"recklessness"***, etc. While distinctions have been frequently attempted among these various formulations (see Prosser, pp. 183-6), the main thing to keep in mind is that all of these terms refer to a more serious departure from standards of ordinary care than would be required to constitute ordinary negligence. Generally, this departure is more serious because the risk of harm is substantially greater than the risk whose disregard constitutes ordinary negligence. See Rest. 2d, §500.

B. Automobile guest statutes: The major context in which a standard of gross negligence or recklessness is applied is that in which a ***nonpaying passenger in an automobile*** is injured, and sues the ***driver-owner*** of the car. So-called ***"automobile guest statutes"***, in force in approximately half the states, provide that the owner-driver is not liable for injuries received by his nonpaying passenger (whether a family member or not) unless the driver has been "grossly" or "willfully negligent" or "reckless."

1. **Rationale:** Two principle rationales have been advanced for such statutes.

   a. **Ingratitude:** First, at the time most of these statutes were enacted in the 1930s, automobile liability insurance was not widespread, and a driver who was successfully sued by his "guest" was likely to bear the considerable expense himself; most legislatures felt that it was unfair to encourage "ingratitude" by guests.

   b. **Collusion:** Secondly, to the extent that there was insurance, there was (and presumably still is today) a risk that the guest and the driver (who are most probably either friends or relatives) will behave ***collusively*** in the lawsuit. That is, the defendant-owner, since he will not be paying the bill, may try to help out the plaintiff by conceding that he was in fact negligent.

2. **Constitutional attack:** In the last several years, several of the statutes have been repealed, and at least six state statutes (including ones in California, Michigan and Ohio) have been found violative of either the ***federal or state***

constitutions. The most important decision in this area is ***Brown v. Merlo***, 506 P.2d 212 (Cal. 1973), holding that the California guest statute violates the Equal Protection clause of the United States Constitution because it is "over-inclusive" — in order to guard against a few collusive suits, it denies recovery to a much larger class of non-colluding plaintiffs.

a. **Sometimes upheld:** But not all recent constitutional attacks on guest statutes have succeeded.

★ **Example:** P is injured in an accident while a guest in a car owned and operated by D, P's grandmother. The state has a guest statute in force, barring P from suing D for simple negligence. *Held*, the guest statute is unconstitutional. It can be argued that the state's guest statute is in violation of the Equal Protection Clause. But since there are still "evils to be corrected, or permissible objectives to be accomplished" by the statute, the court will presume that the legislature's classification is still "reasonable". Any change in the factual basis for the statute (e.g., a decrease in the danger of collusion) should be empirically evaluated by the legislature. *Justice v. Gatchell*, 325 A.2d 97 (Del. 1974).

3. **Who is a "guest":** Because the consequences of application of a guest statute are usually severe, there has been a lot of litigation about who is a "guest" under the statute. Several particular issues frequently arise.

a. **Business guest:** If the passenger has some ***business relationship*** with the host (e.g., salesman driving with prospective customer, boss and employee driving together on business), the passenger is seldom held to be a guest.

b. **Sharing expenses:** What if host and passenger agree to ***share the expenses*** of the trip? If they make an agreement to do so before the trip, this is usually enough to prevent the passenger from being a guest. But if they start out without such an agreement, and the passenger merely offers to pay part of the gas or tolls during the trip, out of courtesy, he will generally remain a guest if the relationship is basically social. Prosser, p. 384.

c. **Child:** Where the passenger is a ***child*** who is too young to have voluntarily become a guest, most, but not all, courts hold that his involuntary passenger status prevents him from being a guest. (Of course, if the owner or driver being sued is a parent or other relative, intra-family immunity, discussed *infra*, p. 227, may bar recovery.)

d. **Owner as passenger:** If the owner of the car turns the driving over to someone else, and becomes a passenger, it is usually held that he has not thereby become a guest. Prosser, p. 385. But see *Ray v. Hanisch*, 306 P.2d 30 (Cal. 1957), holding that the owner does become a guest in this situation.

e. **Request to leave car:** If the guest asks to be let out of the car, and the driver refuses, most courts hold that he ceases to be a guest. Prosser, p. 385.

4. **Intoxication as gross negligence:** It is sometimes held where the host driver drives while ***intoxicated***, his conduct constitutes gross negligence, making the guest statute inapplicable.

VII. RULES OF LAW GOVERNING BEHAVIOR

A. Judge-Made Standards: Courts, particularly appellate courts, formulate rules which other courts, especially lower courts, abide by. However, when an appellate court attempts to regulate ***standards of behavior*** by issuing strict rules, these standards are likely to prove too inflexible, and other courts are not likely to apply them in every situation.

1. ***Goodman* case:** For instance, in *Baltimore & Ohio Railway v. Goodman*, 275 U.S. 66 (1927), Justice Homes attempted to "lay down a standard once and for all" to regulate certain behavior. His rule stated that if a driver wanted to cross over railroad tracks, he must first stop his vehicle, look down the track, and if necessary, get out of his vehicle for an additional look. But as the subsequent case set forth in the following Example illustrates, the *Goodman* rule was too inflexible to work in all situations, and each case had to be decided on its own particular facts. See Prosser, pp. 188-190.

   ★ **Example:** P, a truck driver, arrives at a railroad crossing. Due to an obstruction, he is unable to see if a train is coming. He stops his truck, looks, listens, and then slowly proceeds to cross the tracks. (He does not get out of the truck to look.) While crossing he is struck by a train. *Held*, the jury could have found that P was not negligent even though he did not get out of his truck to look for a train. To leave one's vehicle in such a situation is "an uncommon precaution . . . likely to be futile, and sometimes even dangerous." It is very difficult to create rules of law to govern standards of behavior. "Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal." *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934).

VIII. VIOLATION OF STATUTE

A. Significance of statutory violation: In the cases we have examined thus far, the decision as to what a reasonable man would do in the circumstances was left to the judge and jury. Sometimes, however, the ***legislature*** passes a statute which appears to define reasonable conduct in a certain kind of situation. This is most often true of legislation establishing ***safety standards*** for industry, transportation, etc. A substantial body of case law has arisen discussing the extent to which the court is required to treat a violation of such legislation as ***negligence per se***.

1. **"Negligence per se doctrine":** Most courts follow the general rule that when a safety statute has a sufficiently close application to the facts of the case at hand, an unexcused violation of that statute is ***"negligence per se"***, and the defendant will not be permitted to show that the legislature set an unduly high standard of care.

   ★ **Example:** P drives a buggy after dark without lights, in violation of a New York criminal statute requiring lights. The buggy collides with D's automobile, and P is killed. The trial judge instructs the jury that it may consider the lack of lights as some evidence of negligence, but not as

conclusive on the question of negligence. *Held*, in an appellate decision by Judge Cardozo, "We think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence itself." Since there was evidence at trial that the absence of lights was causally related to the accident, P's violation was necessarily contributory negligence, and he may not recover. *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920).

★ **Example:** D owns a drugstore. His clerk sells a bottle of poison to P without labeling the bottle "poison", as required by statute. P, not knowing that the bottle contains poison, drinks the contents, and dies. *Held*, D is negligent because he violated the standard of care imposed upon him by statute. P's action is not "statutory"; it is simply based on conduct by D which, because of the statutory duty of labelling, is deemed by the court to constitute "negligence *per se*". *Osborne v. McMasters*, 41 N.W. 543 (Minn. 1889).

2. **Causal relation:** As *Martin*, *supra*, indicates, even where the statute is applicable to the facts of the case, the "negligence per se" does not make the defendant liable unless the plaintiff shows that there is a ***causal link*** between the act constituting a violation and the resulting injury. See Prosser, p. 201.

B. "Evidence of Negligence" minority rule: The great majority of courts, as noted, follow the rule expressed in *Martin*, that the unexcused violation of a statute that is applicable to the facts conclusively establishes negligence, i.e., is "negligence per se" or "negligence in itself". A few courts, however, including ones in Massachusetts and New Jersey, hold that a statutory violation is never more than ***evidence of negligence***, which the jury may find is outweighed by other evidence of due care. Prosser, p. 201.

1. **Ordinances and regulations:** Where the case involves a violation not of a legislatively enacted statute, but of a ***local ordinance*** or ***administrative regulation***, a number of courts following the majority rule as to statutory violations follow the minority rule, and hold that violation of the ordinance or administrative regulation is merely evidence of negligence.

   Example: P, visiting friends at an apartment building owned by D, crosses a dark room on the way to the bathroom, steps down the wrong opening, and falls down a flight of stairs. The stairs are not equipped with either a light or handrail, as required by the State Building Code, promulgated by the State Building Code Commission. *Held*, an administrative regulation does not have the same force as a statute, and its violation does not constitute negligence per se. Only the legislature has the power to modify the common law by enacting statutes, and it may not delegate this authority to an administrative body. Therefore, the violation is simply "some evidence of negligence which the jury could take into consideration with all other evidence on the subject." *Major v. Waverly & Ogden, Inc.*, 165 N.E.2d 181 (N.Y. 1960).

C. Penal statutes: Some statutes contain an explicit provision that their violation will give rise to civil liability. If this is the case, of course, the court has no choice but to

give the statute its intended effect, presuming that it is validly enacted and constitutional. The statutes we are talking about principally here, however, are ones which are solely ***penal*** in nature; that is, they provide that a violation is a crime or a misdemeanor, but they do not say anything about whether civil liability ensues.

1. **Deference:** The majority rule that in such situations, the court will apply the statutory standard as a matter of law, is therefore usually explained not by reference to the doctrine of separation of powers, but by the fact that the court is adopting the legislature's determination of what is necessary for safety "voluntarily, out of deference and respect for the legislature." Prosser, p. 192.

D. Statute must apply to facts: Even in states following the majority rule that statutory violations can sometimes be "negligence per se", the courts have set up a series of requirements to ensure that, before the violation will be negligence per se, the statute was intended to guard against the ***very kind of injury*** in question.

1. **Class of persons protected:** First, the plaintiff must be a member of the ***class of persons*** whom the statute was designed to protect. See Rest. 2d, §286(a).

> **Example:** "A Factory Act, the title and detailed provisions of which show that its purpose is only to prevent injuries to employees, requires that all factory elevators be provided with a certain safety device. A, an employee in B's factory, and C, a business visitor to the factory, are injured when the elevator falls, because of a lack of the safety device. The statute will be taken to establish a standard of conduct as to A, but not as to C." Rest. 2d, §286, Illustr. 1.

a. **General interests of state:** A sub-species of this rule is the principle that where the statute is intended to protect only the interests of the ***state*** or of the ***public at large***, and not to protect particular individuals against harm, its violation will not be negligence per se.

i. **Blue Law:** Thus, a ***"Blue Law"***, prohibiting stores from being open on Sunday, would not conclusively establish the negligence of a store owner who opened on Sunday, exercising all reasonable care, but whose customer slipped on the store floor. The law would be held to protect the interest of the public at large in having a day of rest, not to protect individuals who would otherwise shop on Sundays. (Such a statute would also be held not to meet the other requirement, that of protecting against the kind of harm in question, since it is clear that the statute is not designed to protect against Sunday falls in stores). Prosser, p. 192-3.

b. **Two classes of persons protected:** But a statute may be held to have been intended to protect both the public at large as well as a particular class of individuals. If so, its violation may be negligence per se.

★ **Example:** P, sitting in the D Bar, becomes innocently enmeshed in a barroom brawl, and is injured. An administrative regulation provides that no tavern operator "shall permit or suffer any loud, noisy, disorderly or boisterous conduct, nor permit any visibly intoxicated person to enter or

remain upon his premises." *Held*, this regulation, and the statute under the authority of which it was promulgated, were intended to protect not only the interest of the community at large in peace and quiet, but also barroom customers from the "carnage of the barroom brawl." Therefore, P fell within one of the classes of persons to be protected by the act, and violation by D constitutes negligence in itself. *Stachniewicz v. Mar-Cam Corp.*, 488 P.2d 436 (Ore. 1971).

2. **Protection against particular harm:** The second requirement the statute must meet before it is a violation per se is that it must have been intended to protect against the ***particular kind of harm*** that the plaintiff seeks to recover for. See Rest. 2d, §286(b).

   Example: A statute requires that vessels carrying animals across the ocean shall keep them in separate pens. The statute is obviously intended to protect only against the spreading of contagious diseases from animal to animal. P send his sheep on D's ships, and D violates the statute by herding P's sheep together with other animals. Because there are no pens, the sheep are washed overboard during a storm. *Held*, the statutory violation cannot be relied on because "the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs." There might have been a recovery, however, had P's sheep been lost through disease because of overcrowding. *Gorris v. Scott*, L.R. 9 Ex. 125 (Eng. 1874). See also Rest. 2d, §286, Illustr. 4.

   ★ **Example:** P engages D to give her chiropractic treatment. D holds himself out to be able to diagnose and treat disease, yet he hold no license to practice medicine; he is therefore in violation of the New York Public Health Law. P suffers paralysis, allegedly as a result of the treatment. *Held*, D's violation of the statute requiring a license does not by itself constitute negligence which would make D liable. The requirement of a license was intended to protect the public against incompetent practitioners. Therefore, P must prove that D was in fact incompetent by showing that D did not exercise the same standard of care that a reasonable medical doctor would have exercised (and if she does so, the statutory violation will not add anything to her case). *Brown v. Shyne*, 151 N.E. 197 (N.Y. 1926).

   a. **Keys left in car:** The significance of how the "type of risk" question is resolved is illustrated by cases where ***keys*** have been left in a parked car, in violation of a statute requiring that keys not be so left, and a theft, and an ensuing accident, have resulted. Where the court has construed the purpose of the statute as being to guard against reckless driving by thieves, negligence per se has been found; where it has been found to be for some other purpose, there has been no such automatic liability. Prosser, p. 194-5.

3. **Excuse of violation:** Once the plaintiff has shown that the statute was addressed to a class of person including himself, and that it was designed to guard against the kind of harm that he sustained (and assuming that he carries

the more general burden of showing that the act that was violative of the statute was the actual ***cause*** of the harm), the defendant's negligence per se has been established. However, in some circumstances, the defendant may then have the right to show that his violation of the statute was ***excusable.*** If he can do this, the violation will be stripped of its "negligence per se" nature, and will be, at most, evidence of negligence which the jury will weigh, and may disregard.

a. Absolute duties: There are some statutes which, the court may hold, by their nature and history leave no room for excuses. That is, they impose upon the defendant an ***absolute duty*** to comply with the statute, and a good faith attempt to do so is not sufficient.

i. Typical cases: For instance, statutes prohibiting the use of ***child labor*** have generally been held to fall in this category. Thus an employer who hires a child in violation of the statute will be held liable if an injury occurs of the sort that the act was intended to protct against, and the employer will not be heard to say that he believed in good faith that the child was above the minimum age.

ii. Brakes: Statutes requiring ***effective brakes*** on automobiles have also occasionally been held to fall in this "absolute duty" class. (But see *Davison v. Williams*, *infra*, this page).

★ **Example:** P, a passenger in a car, is injured when a truck operated by D collides head-on with the car in which P is riding. D claims that he is excused of liability because of the failure of his footbrake. A statute requires all motor vehicles to have brakes " . . . adequate . . . to stop and hold such . . . motor vehicle. . . . " *Held*, for P. D had an absolute duty to maintain his brakes in working order at all times, and he is not excused from liability even if he used ordinary care to maintain them. *Spalding v. Waxler*, 205 N.E.2d 890 (Ohio 1965).

b. Excusable violation: Most statutes, on the other hand, are generally held to require (at least with respect to negligence liability on a "negligence per se" theory) merely a ***reasonable effort to comply.*** The Second Restatement lists a number of fact patterns which will constitute excuses for violation. Rest. 2d, §288A(2). The more important of these include:

i. Ignorance of need: The defendant was reasonably unaware of the particular occasion for compliance;

★ **Example:** D, whose car is overtaking P's, attempts to stop, but his brakes fail, and a collision results. A statute provides that "all brakes shall be maintained in good working order." D produces evidence to show that the brake failure was sudden, and did not result from a lack of reasonable care by him. *Held*, the existence of a violation of this statute provides merely a rebuttable presumption of negligence. D is free to show that he "did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." If he does so, the violation will not be neligence per se. *Davison v. Williams*, 242 N.E.2d 101 (Ind. 1968).

ii. **Reasonable attempt to comply:** Similarly, the violation may be excused because the defendant made a reasonable and diligent attempt to comply, but was unsuccessful;

iii. **Emergency:** Or it may be excusable because the defendant was confronted with an ***emergency*** not of his own making;

Example: A statute provides that all cars shall drive on the right hand side of the road. D is driving on the right when he sees a child dash into the street. To avoid the child, he swerves into the left lane. Assuming that his conduct was otherwise reasonable, his violation of the statute will be excused, and there will be no negligence. See Rest. 2d, §288A, Illustr. 5.

iv. **Greater risk of harm:** A violation may be excused if compliance would have involved a ***greater risk of harm*** to the actor or to third persons than the path of noncompliance chosen by the defendant.

Example: A statute provides that pedestrians walking along the highway shall walk towards oncoming traffic. Ps are walking along a highway one night, when traffic conditions are such that traffic on the left side (where Ps are required by statute to walk) is much heavier than on the right side. They therefore walk on the right side, and are hit by D. D argues that they were contributorily negligent as a matter of law, because of their statutory violation. *Held*, Ps' violation will be excused where it would have been more dangerous to comply. *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939).

Note: The court in *Tedla* distinguished between statutes which "define the standard of care and the safeguards required to meet a recognized danger" (as to which the court said no excuse is allowable) and statutes such as the one there, which the court stated "fixes no definite standard of care which would under all circumstances tend to protect life, limb or property, but merely codifies or supplements a common law rule, which has always been subject to limitations and exceptions." In this latter event, the court held, the statute "should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common law duty . . . ." However, Prosser suggests that this "implied exception theory" is really a rationalization, and that the true reason the court allowed the exception was simply because "the courts reserve the final authority to determine whether the civil standard of reasonable conduct will always require obedience to the criminal law." Prosser, p. 198.

4. **Foolish or obsolete legislation:** There are many statutes on the books which have never been enforced, or which have not been enforced for so long that they may be treated as ***obsolete.*** In such a situation, the court will often in effect treat the violation as excused, although in reality the court is really simply declining to accept the legislative standard as binding on the civil liability question. See e.g., *Stevens v. Luther*, 180 N.W. 87 (Neb. 1920), holding that violation of a six-mile-an-hour railroad speed limit is not negligence per se.

5. **Effect of the plaintiff's contributory negligence:** Even where the

defendant's negligence per se is established, he may be able to assert the defenses of ***contributory negligence*** or ***assumption of risk.*** However, if the statute is of a sort that is held to impose an absolute duty on the defendant, and therefore to allow no excuses (see *supra*, p. 100) these defenses may not be available. Thus an employer who violates the child labor laws will not be allowed to raise the defense of contributory negligence, since this would defeat the entire purpose of the statute. This limitation upon the defenses of contributory negligence and assumption of risk is further discussed *infra* at pp. 210 and 223, respectively.

> **Example:** D, a storekeeper, sells glue to P, a fourteen-year old. A statute provides that no one shall sell glue to a minor, unless it is contained in a packaged model kit. P sniffs the glue, suffers nerve damage, falls down, and drowns in a creek. *Held*, this statute is one of the rare ones which imposes absolute liability, regardless of the exercise of due care. Consequently, the defenses of contributory negligence and assumption of risk will not be allowed; otherwise, the purpose of the statute would be defeated. *Zerby v. Warren*, 210 N.W.2d 58 (Minn. 1973).

6. **Contributory negligence per se:** The defendant may, in an appropriate case, demonstrate that the plaintiff's violation of a statute constitutes ***contributory negligence per se.*** Generally speaking, the rules are the same for asserting contributory negligence per se as for negligence by the defendant per se. See, for instance, *Martin v. Herzog*, *supra*, p. 97.

   a. **Hurdles:** But keep in mind that the hurdles which must be surmounted before negligence per se is established are still imposed; thus if the statute is construed as one which was not intended for the protection of a person in the position of the plaintiff, the violation will not conclusively establish contributory negligence.

   b. **Speed limits:** Generally, however, such statutes as ***speed limits*** and other traffic regulations are held to be for the purpose of protecting plaintiff drivers who violate them, as well as innocent third persons. See Prosser, p. 203.

7. **Violation as evidence:** Even if the plaintiff (or the defendant, in a case involving contributory negligence) is unable to meet all the requirements of the negligence per se doctrine, the statutory violation may still be taken as ***evidence of negligence***.

   > **Example:** A statute providing that hogs must be confined by fences of a particular strength is construed to be solely for the purpose of preventing misbreeding. D violates the statute by using less than the required strength of fence to enclose his hogs. One breaks the fence, runs into the highway, collides with P's car, and the resulting accident injures P. Even though the violation is not negligence per se (since the statute was not intended to guard against the kind of harm which occurred) the jury may consider the degree of strength required by the statute as evidence as to how strong a fence is needed to keep hogs from breaking loose. See Rest. 2d, §288B, Illustr. 2.

8. **Per se doctrine not available for federal claims:** All the cases involving negligence per se that we have examined thus far have been state court cases. What happens to the doctrine when a case is brought in ***federal court?***

   a. **Diversity cases:** In a ***diversity case***, where the plaintiff is relying upon state law of negligence, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), would require the federal court to follow the same rules regarding the effect of statutory violations as would the courts of the state in which the federal court sits. Thus if the federal court were sitting in a state following the majority "negligence per se rule", this rule would also be applied by the federal court. (For a more detailed discussion of the civil procedure aspects of this area, see Emanuel on Civil Procedure.)

   b. **Federal question case:** But suppose the plaintiff argues that the defendant violated a ***federal criminal statute***, and that the doctrine of negligence per se should be applied by the federal court. This situation would not call for application of the *Erie* doctrine, since that doctrine only applies where state law supplies the "rule of decision", i.e., where state law supplies the basic right being sued upon. Furthermore, once the federal court treated the issue as a "federal question", as it would have to do, it would not be able to apply the "negligence per se" doctrine because that doctrine is a product of common law, and there is no "general federal common law" as the result of *Erie*. See P,W&S, p. 231.

   c. **Consequence:** Consequently, a plaintiff suing in federal court, seeking to establish civil liability from the defendant's violation of a federal statute, will normally have to show that Congress created an "implied civil remedy" in passing the statute. This is a much harder showing to make than is generally required for application of the common law negligence per se doctrine.

   ★ **Example:** D hires the Ps' son, a sixteen-year-old boy. In violation of the Federal Fair Labor Standards Act (FLSA), D assigns the son to a fork-lift truck (classified by the Act as a "particularly hazardous" activity not permitted for minors); the truck turns over and kills the Ps' son. Ps allege that they are entitled to damages as a result of the FLSA violation. *Held*, Congress, in enacting the FLSA, did not intend to create an implied civil remedy for violations nor to expand a state's wrongful death liability, however small that may be. Instead, the Act provided for carefully detailed criminal sanctions. Therefore, the Ps recover nothing. (They are entitled to an award under the state workmen's compensation law.) *Breitweiser v. KMS Industries, Inc.*, 467 F.2d 1391 (5th Cir. 1972).

   Note: Plaintiffs in *Breitweiser* had a state remedy available to them — a workmen's compensation award, which under Georgia law was the sole relief for one injured on the job, and which was limited to a recovery of $750. For this reason, the plaintiffs did not sue in state court, and did not bring a suit in diversity based on a state negligence cause of action. They realized that their only hope of a recovery of more than $750 was to bring a federal question suit, claiming a federal right to civil damages, arising out

of the federal statute and independent of any state cause of action. They could not argue "negligence per se", since that concept, as noted, applies only to common law negligence, which does not exist as a federal cause of action under *Erie*.

9. **Compliance with statute not dispositive:** The converse of the "negligence per se" doctrine does not hold true. That is, the fact that the defendant has ***fully complied*** with all applicable state safety regulations does ***not by itself establish*** that he was not negligent. The finder of fact is always free to conclude that a reasonable man would take precautions beyond those required by statute. This is particularly true where the situation at hand was more hazardous than the usual situation the statute was designed to govern. See Rest. 2d, §288C.

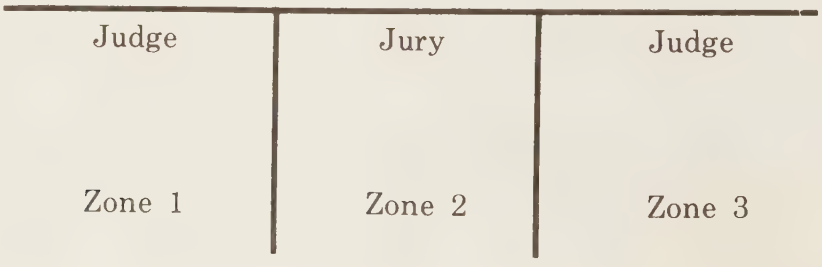
   a. **Usual case:** But if the situation confronting the defendant was substantially the same as that which the statute was designed to control, the finder of fact may consider the defendant's full compliance with all statutes as evidence that nothing more was required of a reasonable man. See Prosser, pp. 203-4.

IX. PROCEDURE IN JURY TRIALS

A. **Aspects of procedure:** Since most tort cases are tried before juries, it is important to understand at least a few basic aspects of jury trial procedure. Considered here are two principal topics: (1) the ***burden of proof***, and (2) the allocation of functions between ***judge and jury***.

B. **Burden of proof:** In a negligence case, as in virtually all tort cases, the plaintiff is said to bear the ***"burden of proof"***. In reality, the plaintiff actually bears two distinct burdens:

   1. **Burden of production:** First, he must come forward with some evidence that the defendant was negligent, that he, the plaintiff, suffered an injury, that the defendant's negligence was the proximate cause of this injury, etc. This burden is generally known as the ***"burden of production"***. The burden of production may be defined as the obligation upon a party to come forward with evidence in order to avoid a directed verdict (i.e., an instruction from the judge to the jury telling them that they must decide in favor of the party not bearing the burden of production). This burden can and does shift from the plaintiff to the defendant and possibly back again, depending on the strengths of the proof offered by each side. The following diagram, adapted from Field, Kaplan & Clermont, *Cases and Materials on Civil Procedure*, p. 488, is illustrative:



a. **Directed verdict for defendant:** The case starts off in Zone 1 — if the plaintiff does not produce any evidence in support of his *prima facie* case, the judge will order a directed verdict for the defendant. That is, he will tell the jury that as a matter of law, it must find for the defendant.

b. **Jury case:** If the plaintiff comes forward with enough evidence in support of his *prima facie* case that a reasonable man could (but would not necessarily have to) decide in the plaintiff's favor, the case is in Zone 2, and will go to the jury. Once the case is in Zone 2, neither party bears the burden of production, since neither party must come forward with additional evidence in order to avoid a directed verdict against himself.

c. **Directed verdict for plaintiff:** It may be, however, that the plaintiff's case is so strong that, unless the defendant comes forward with rebutting evidence, the court will have to order a directed verdict in the plaintiff's favor (i.e., the court will decide that no reasonable man could find in favor of the defendant). If so, the case is in Zone 3, and plaintiff has in effect shifted the burden of production to the defendant.

d. **Effect of defendant's case:** When the defendant puts on his case, he can similarly move the burden of proof from Zone 3 to Zone 2 or 1 (leading to submission of the case to the jury, or a directed verdict in favor of the defendant, respectively). Or, if he starts his portion of the case with the matter in Zone 2, he may produce so little evidence that the case stays in that Zone (and is given to the jury), or enough to get it to Zone 1, directed verdict for himself.

2. **Practical significance:** The judge does not monitor the shifting burden of production throughout the trial. It is really only at two points that evaluation of the burden is significant: first, at the end of the plaintiff's case, the defendant usually moves for a directed verdict; that is, he asks the court to declare that the plaintiff has failed to move the case out of Zone 1, and that the jury should be instructed that it must decide in his, the defendant's, favor. Secondly, at the end of the defendant's case, each side is likely to move for a directed verdict, the plaintiff alleging that the case is in Zone 3, and the defendant that it is in Zone 1.

3. **Burden of persuasion:** The second respect in which the plaintiff begins by bearing the burden of proof is that he bears what is sometimes called the ***"burden of persuasion"***. This means that if the case goes to the jury (i.e., if the case ends up in Zone 2), the plaintiff must convince the jury that it is ***more probable than not*** that his injuries are due to the defendant's negligence. To put it another way, the fact that the plaintiff bears the burden of persuasion means that if the jury believes that there is exactly a fifty percent chance that the defendant caused the injuries, the plaintiff loses. The concept is usually expressed by saying that the plaintiff must demonstrate his case ***"by the preponderance of the evidence"***.

a. **Not usually shifted:** The burden of persuasion, in a negligence case (and, in fact, in almost every kind of case) rests on the plaintiff from the beginning, and almost never shifts. However, there are a few jurisdictions

which hold that application of the doctrine of *res ipsa loquitur* does shift this burden to the defendant; this is discussed *infra*, p. 114.

C. **Circumstantial evidence:** Sometimes, the plaintiff may be lucky enough to prove his case by direct evidence. For instance, he may be able to produce an eye witness who will testify that the defendant behaved in a particular way, and that the plaintiff was injured in a particular way as a result. But very often, the plaintiff will make his case by ***circumstantial*** evidence. Circumstantial evidence has been defined as "evidence of one fact . . . from which the existence of the fact to be determined may reasonably be inferred. It involves, in addition to the assertions of witnesses as to what they have observed, a process of reasoning, or inference, by which a conclusion is drawn." Prosser, p. 212.

★ **Example:** P, departing from a train run by D Railroad, slips on a banana peel left on the railroad platform. No one testifies as to how long the banana lay there prior to the accident (which would bear on whether D's employees were negligent in not yet having picked it up). However, witnesses testify that the banana was, after the accident, "flattened down, and black in color," "dry, gritty, as if there were dirt upon it," etc. *Held*, the jury could have justifiably inferred, from the appearance and condition of the banana peel, that it had been on the platform for such a long period of time that D's employees would have seen and removed it if they had been reasonably careful. This circumstantial evidence was enough to rebut the possibility that the peel might have been dropped moments prior to the accident by another passenger. Therefore, it was error to direct a verdict for the defendant. *Anjou v. Boston Elevated Railway Co.*, 94 N.E. 386 (Mass. 1911).

1. **Importance of careful proof:** The above case illustrates the importance of having a lawyer who presents a full range of testimony and proof. For instance,
★ in *Goddard v. Boston & Maine R.R. Co.*, 60 N.E. 486 (Mass. 1901), P, like the plaintiff in *Anjou*, fell on a banana peel in a railroad station. But because there was no testimony as to the color or composition of the banana, the appellate court held that it was quite likely that it had been dropped just a moment before, by another passenger (in which case the railroad did not act unreasonably in not sweeping it up instantly). Therefore, P was not permitted to recover.

2. **Importance of underlying legal rules:** The value of circumstantial evidence in a particular situation will also, of course, depend on the relevant principles of legal liability imposed by the court. For instance, in still another "banana peel" case, the court, like the *Goddard* court, held that there was no liability because, although there was testimony that the banana was discolored and dirty, these witnesses only saw it ***after*** P had fallen on it; therefore, it might have been there
★ for only a few seconds, not long enough to put D (a grocery store) on notice. *Joye v. Great Atlantic and Pacific Tea Co.*, 405 F.2d 464 (4th Cir. 1968). But by contrast, another court (in a "pizza slice" rather than "banana peel" situation) accepted P's argument that since D followed dangerous procedures (giving customers the slices at a counter, and letting them be carried over a slippery

floor), it could be liable even if the slice in question was not on the floor long enough for D to have been put on actual or constructive notice. *Jasko v. F.W.* ★ *Woolworth Co.*, 494 P.2d 839 (Col. 1972).

D. Function of judge and jury: Both the judge and jury play a significant role in the adjudication of a negligence case. An extended discussion of the allocation of roles between the two is not possible here; however, a few general observations may be made:

1. **Judge decides law:** The ***judge***, of course, decides all ***questions of law.*** In a negligence case, this means that the judge will decide, typically, the following issues:

   a. **State of facts:** He will decide, after all the evidence is in, whether that evidence admits of more than one conclusion. If he decides that ***reasonable men could not differ*** as to what the facts of the case are, he will instruct the jury as to the findings of fact they must make (thus virtually taking the case out of their hands.)

      Example: Suppose plaintiff brings a medical malpractice case, and attempts to show that the defendant left a sponge in his body. If the judge decides that reasonable men could differ as to whether the sponge was really left in the plaintiff's body, or as to whether it was really left there by the defendant, the judge will allow the jury to decide this fact question (assuming that the plaintiff has demonstrated the other aspects of his case sufficiently so as to be entitled to go the jury.) But if the judge concludes that all reasonable men would agree that the sponge was left in the body, he will instruct the jury that it must so find; similarly, if there could be no doubt that the sponge was not left in the body, he will so instruct the jury.

   b. **Existence of duty:** The judge will also determine what the defendant's ***duty*** to the plaintiff was. This is done as a matter of law. Thus in a suit by a plaintiff trespasser against a defendant landowner, the court will probably instruct the jury that, provided the defendant did not know of the plaintiff's presence, he owed him no duty of care at all. And in an accident case, the judge will instruct the jury that the defendant owed the plaintiff the duty of care that a reasonable man would exercise in the circumstances.

   c. **Directed verdict:** By deciding aspects of both of these matters, the judge may remove the case from the jury by ***directing a verdict.*** Thus in an accident case, if the judge concludes that reasonable men would all agree that the defendant had behaved reasonably, and also decides as a matter of law that the defendant owed only the duty of behaving as a reasonable man would under the circumstances, he will direct the jury to find for the defendant.

2. **Jury's role:** The jury, it is commonly said, is the finder of the facts. However, since as we have seen the judge may sometimes decide the facts as a matter of law, what this really means is that the jury will be permitted to find the facts only where these facts are in such dispute that reasonable men could differ on

them. If the case is sufficiently unclear that it is permitted to go to the jury, the jury will decide two principal factual issues:

a. What happened: First, what really happened; and

b. Particular standard of care: Secondly, whether the facts as found indicate that the defendant breached his duty of care to the plaintiff, in a way that proximately caused the plaintiff's injuries.

See generally, Prosser, pp. 205-208.

X. *RES IPSA LOQUITUR*

A. Aid in proving the case: A plaintiff's tort lawyer often has a difficult task in proving his case. Frequently, it is made particularly hard by the fact that the plaintiff does not have any knowledge of or access to the facts about the defendant's conduct. This section is about a doctrine which, when it applies, makes the plaintiff's task significantly easier. The doctrine of ***res ipsa loquitur*** (which in English means ***"The thing speaks for itself"***) allows the plaintiff to point to the fact of the accident, and to create an inference that, even without a precise showing of how the defendant behaved, the defendant was probably negligent.

★ **Example:** P is walking in the street past D's shop, when a barrel of flour falls on him from a window above the shop. In P's suit against D, his evidence demonstrates only these facts, and shows nothing about any actual acts by D or his employees. *Held*, P has presented enough evidence to justify a verdict for him. "A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems . . . preposterous. . . . It [is] apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; . . . the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence, it is for the defendant to prove them." *Byrne v. Boadle*, 159 Eng. Rep. 299 (Eng. 1863).

Note: It was in this case that one of the judges, Chancellor Pollock, observed that this was a situation "of which it may be said *res ipsa loquitur*".

B. Requirements for doctrine: Virtually all American courts recognize that there are situations in which the doctrine of *res ipsa loquitur* should be applied, thus permitting the plaintiff to create an inference of the defendant's negligence without any direct evidence showing that negligence. The courts generally agree on at least ***three requirements*** before the doctrine may be applied:

1. **Seldom occurs without negligence:** First, the plaintiff must demonstrate that the event is of a kind which ordinarily does not occur except through the negligence (or other fault) of someone. See Rest. 2d, §328D(1)(a).

2. **In defendant's control:** Secondly, plaintiff must show that the instrument which caused his injury was, at the relevant time, in the ***exclusive control*** of the defendant.

3. **Rule out plaintiff's contribution:** Thirdly, plaintiff must show that his injury was not due to his own action. See Prosser, p. 214.

4. **Accessibility of information:** Some courts have purported to hold that in addition to establishing these three things, the plaintiff must also show that a true explanation of the events is more readily ***accessible*** to the defendant than to himself. However, few courts have really relied on this requirement, as is discussed further below.

C. **Inference of someone's negligence:** The plaintiff must, as stated, demonstrate that the harm which befell him does not normally occur except through the negligence of someone. This is true of, for instance, falling elevators, escaping gas or water from utility mains, the explosion of boilers, etc. (See Rest. 2d, §328D, Comment c). The plaintiff is not required to prove that such events ***never*** occur except through someone's negligence; all he has to do is to show that ***most of the time***, negligence is the cause of such occurrences.

1. **Aviation:** Thus it is now generally accepted that where an ***airplane crashes*** without explanation, the jury may infer that negligence was more than likely the cause. In the early days of aviation, however, where the elements were often sufficient to cause a crash without anyone's negligence, and where there was no body of accident history to justify any conclusion about the general causes of accidents, most courts refused to allow this inference, and the doctrine of *res ipsa loquitur* was therefore not applied. See Prosser, p. 216.

2. **Basis of conclusions:** Normally, the fact that a particular kind of accident does not usually occur without negligence is within the ***general experience of the jury,*** and does not have to be explicitly proved by the plaintiff. However, there are other cases (e.g., ***medical malpractice***) where the plaintifff may wish to provide ***expert testimony*** to the effect that accidents such as the one that occurred normally do not happen without negligence.

3. **Negating other causes:** The plaintiff is not required to demonstrate that there were no other possible causes of the accident. He must merely prove the more-than-fifty-percent probability that there was negligence.

   ★ **Example:** P's decedent is a passenger on D's airplane, which disappears over the Pacific Ocean. Only debris is ever found, and P produces no evidence at trial as to any actual negligence by anyone. D produces evidence that the airplane was properly maintained, the personnel adequately trained and briefed, the weather normal, etc. *Held*, D's showing of general due care in its operations is not sufficient to deprive the finder of fact (in this case, a trial judge) of the right to infer that negligence was more probably than not the cause of the accident. P is not required to demonstrate that there was no mechanical failure, or to negate every other possible cause. Therefore (since the other requirements were met) the

doctrine of *res ipsa loquitur* is appropriate. *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967). See also Rest. 2d, §328 D, Illus. 3.

D. Showing that negligence was defendant's: The plaintiff must also show, again by a preponderance of evidence, that the negligence was ***probably that of the defendant.*** In the older cases, this requirement is usually expressed by stating that the plaintiff must demonstrate that the instrumentality which caused the harm was at all times within the ***exclusive control*** of the defendant.

★ **Example:** During the great V-J celebration, P is walking on the sidewalk next to D Hotel, when she is hit by a falling armchair. P proves no other facts at trial. *Held*, "A hotel does not have exclusive control, either actual or potential, of its furniture. The guests have, at least, partial control." Therefore, P has failed to establish the requirement for *res ipsa*. *Larson v. St. Francis Hotel*, 188 P.2d 513 (Cal. 1948).

1. **Modern view:** Most modern cases, however, do not express this requirement solely in terms of "exclusive control" by the defendant. Instead, they simply require the plaintiff to show that, more likely than not, the negligence was the defendant's, not someone else's. Thus in the Larson case, the court, after speaking of "exclusive control", also noted that "the mishap would quite as likely be due to the fault of a guest or other person as to that of defendant's. The most logical inference . . . is that the chair was thrown by some such person from a window."

2. **Plaintiff's particular evidence:** To demonstrate that the negligence is more probably that of the defendant, the plaintiff is of course entitled to produce evidence ***negating other possibilities.*** Thus a plaintiff injured by a soda bottle which explodes after he has bought it from a retailer may produce evidence showing that the retailer handled the bottle carefully, and that he himself handled it carefully, at all times. Prosser, p. 219.

3. **Multiple defendants:** Sometimes the plaintiff sues ***two or more defendants*** at once, alleging that some or all of them have been negligent. If the plaintiff can demonstrate the probability that his injury was caused by the negligence of at least one of the defendants, but cannot show which of them, may the doctrine of *res ipsa* be applied against all? This has been one of the major questions in the recent history of the doctrine.

   a. ***Ybarra* case:** The most famous case holding that the answer to this question can sometimes be "Yes" is ***Ybarra v. Spangard***, set forth in the following example.

   ★ **Example:** P goes into the hospital for an appendectomy. After the operation, his shoulder hurts, and turns out to have sustained a serious injury during the operation. P sues the surgeon, the attending physician, the owner of the hospital, and the anesthesiologist. He demonstrates that at least one of them (or a nurse under the control of one of them) must have been negligent, but is unable to offer any evidence as to which. *Held*, *res ipsa* may be applied. It would be unreasonable to require the plaintiff to

identify the negligent defendant, insofar as he was unconscious throughout the operation. Furthermore, the defendants bore interrelated responsibilities; each of them had a duty to see that no harm befell P. Therefore, each of the defendants who had any control over or responsibility for P must bear the burden of rebutting the inference of negligence by making an explanation of what really happened. (This should be done at a new trial.) *Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944).*

Note: At the retrial, all of the defendants except the hospital owner testified that nothing had occurred during the operation which would explain P's injury. The trial court, without a jury, found against all of the defendants.

b. **Special relationship:** The result in *Ybarra* seems to be at least partially due to the fact that the defendants all bore an integrated relationship as professional colleagues, and that all had a responsibility for the patient's safety. Where the multiple defendants are ***strangers*** to each other, and have only an ordinary duty of care to the plaintiff, *res ipsa* has generally ***not*** been allowed merely upon a showing that at least one of them must have been negligent.

Example: P, a pedestrian, is injured by a collision between cars driven by D1 and D2. P shows at trial that automobile accidents do not normally occur without the negligence of someone, but he is unable to show that the accident was more likely due to the negligence of one than the other. P will be unable to obtain application of the doctrine of *res ipsa*, because he has not shown that a particular defendant was, more likely than not, negligent. See Prosser, p. 221.

c. **Other cases following *Ybarra:*** But there are a few nonmedical cases in which the rationale of *Ybarra* has been followed. For instance, a plaintiff injured by an exploding bottle, who has sued both the retailer and the manufacturer, has been given the benefit of *res ipsa* even though he made no showing as to which of the two was negligent. *Loch v. Confair*, 93 A.2d 451 (Pa. 1953). See Prosser, pp. 223. But as a general rule, *res ipsa* will not apply against multiple defendants where the evidence is only that some unidentified one of them must have been negligent.

E. Not due to plaintiff: The final requirement for the application of *res ipsa* is that the plaintiff establish that the accident is probably not due to his own conduct.

Example: P is an engineer operating a locomotive of D Railroad. Part of his job is to keep the right amount of water (and therefore the right level of steam) in the boiler. The boiler explodes and kills P. If there is no evidence showing that P was not himself responsible for the explosion (by putting in too much water), *res ipsa* will not apply. But if there is testimony that P acted properly, the doctrine may apply. Rest. 2d, §328D, Illustr. 11.

1. **Contributory negligence:** ***Contributory negligence*** on the part of the plaintiff will sometimes, but ***not always***, constitute a failure to meet this

requirement. Thus, in the above example, if it were shown that P was contributorily negligent in his duty to keep the right water level, the doctrine would not be applied. But if the plaintiff's contributory negligence does not lessen the probability that the defendant was also negligent, the requirement may be met.

Example: P, walking near a construction site, is hit by a falling beam. P proves that beams do not usually fall from construction sites without negligence, and shows that D's employees were at all times in control of all beams. The fact that P may have been contributorily negligent in walking too close to the construction site is irrelevant as far as application of *res ipsa* goes; the doctrine will still apply. (Of course, contributory negligence may bar P from a recovery anyway, but it would not if the jurisdiction is one which applies comparative, as opposed to contributory, negligence — see *infra*, p. 214).

F. Evidence more available to defendant: A number of courts have stated that *res ipsa* will only apply where evidence of what really happened is more available to the defendant than to the plaintiff. This was, for instance, one of the underlying rationales involved in the *Ybarra* case. However, although it is true that application of *res ipsa* helps to "smoke out" the defendant (i.e., forces him to explain or pay), it does not seem to be a real requirement that evidence be more available to defendant than to plaintiff. For instance, in the *Cox* case, *supra*, p. 109, the reasons for the airplane's disappearance were no more available to the defendant airline than to the plaintiff. Yet the doctrine of *res ipsa* was applied. See Prosser, pp. 225-226.

★ **Example:** P is a passenger in a car driven by D. The automobile strikes an embankment, and both P and D die. *Held*, the jury should be allowed to apply *res ipsa loquitur* in deciding whether D is guilty of negligence. "The fact that the driver of the motor vehicle died in the accident, thus making his superior knowledge unavailable, does not render the doctrine inapplicable." The doctrine shall be applied because the automobile was under the exclusive control of D and the accident would probably not have occurred if D had used caution and reasonable care. *Johnson v. Foster*, 202 So.2d 520 (Miss. 1967).

Note: Due to an error in jury instructions, the case was remanded for a new trial.

G. Breach of duty: Even if *res ipsa* applies to permit the inference that the defendant must have been negligent, the plaintiff still has the burden of showing that this negligence constituted a breach by the defendant of his duty of care. Thus if an injured automobile passenger sues the owner-driver, and a guest statute provides for liability only in the event of gross negligence (see *supra*, p. 94), *res ipsa* will only be helpful to the plaintiff if the facts permit an inference that the defendant must have been grossly negligent, not merely "ordinarily" negligent. See Rest. 2d, §328D, Comment j.

H. Effect of *res ipsa*: The usual effect of the application of *res ipsa* is, as we have seen,

to permit an inference that the defendant was negligent, even though there has been no direct, eyewitness evidence that he was. In this respect, *res ipsa* is merely a doctrine that sanctifies the use of a particular kind of ***circumstantial evidence.*** The consequence of the doctrine's application is that the plaintiff has ***met his burden of production***.

★ **Example:** P is a guest in a tractor-trailer driven by D. D loses control of the truck, it overturns, and crushes P to death. P sues, and at trial D is unable to explain what caused the accident. Nonetheless, the jury finds for D, and P appeals. *Held*, the case was a proper one for *res ipsa loquitur*, since the vehicle was under D's control, and vehicles usually don't suddenly run off the road without negligence. But application of the doctrine merely means that the jury ***could*** find negligence, not that it was ***required*** to. Therefore, its verdict in D's favor will not be overturned. *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. 1953).

1. **Diagram:** Putting the problem in terms of the diagram on p. 104,P in *Sullivan*, by earning the right to have *res ipsa* apply, moved the case at least into Zone 2 (where it would be sent to the jury). According to the *Sullivan* court, he did not move it to Zone 3, where a directed verdict in his favor would have been required. Occasionally, however, the plaintiff may meet the requirements for the doctrine's application so convincingly that the court will rule, as a matter of law, that the defendant must have been negligent (i.e., the case will end up in Zone 3).

   Example: The two Ps take off in a small plane piloted by D. The plane disappears, and its wreckage is found the next day. The evidence shows that the weather was clear. Ps produce testimony indicating that the plane may have run out of fuel, but D rebuts this with evidence that there may have been usable fuel left in the plane at the time of crash. D also introduces evidence that the Ps may have been drunk.

   Held, the Ps are entitled to a directed verdict on the issue of negligence. The three requirements for *res ipsa* have all been established as a matter of law. As for the requirement that the accident be of a sort which normally does not happen in the absence of negligence, "It seems reasonably clear in light of the circumstances surrounding the crash that the accident ordinarily would not have taken place in the absence of negligence." The second requirement, that the negligence probably be that of the defendant, is not negated by the possibility that there was a mechanical failure, since even if there was, the plane was still in the exclusive control of D, and he would be responsible for any such failure. As for the last element, absence of interference by the plaintiffs, the position of the bodies indicated that the Ps probably remained in their seats and that their drunkenness, if it existed, did not lead them to interfere.

   Therefore, *res ipsa* applies as a matter of law, and the trial judge was correct in directing a verdict for plaintiff on the issue of negligence. *Newing v. Cheatham*, 540 P.2d 33 (Cal. 1975).

   Note: By saying that the plaintiffs had established the elements of *res ipsa* as a matter of law, the court in *Newing* was affirming the trial judge's use

of his ***fact-finding powers***. That is, as described *supra* on p. 107, the trial judge was holding that certain factual showings (e.g. that the negligence was probably that of the defendant) were so clearly made that reasonable men could not differ on them.

2. **More extended effect of doctrine:** Most courts hold that the effect of *res ipsa* is no different than the effect of any other kind of circumstantial evidence. That is, they hold that the inference of plaintiff's negligence may be either strong or weak, depending on how convincingly the plaintiff has met his three requirements for the doctrine. In these courts, a *res ipsa* case may therefore either go to the jury (in which case the jury may choose to either accept or reject the inference of negligence, depending on the strength of the defendant's rebuttal evidence) or lead to a directed verdict (as in *Newing*). A few courts, however, give the doctrine an effect beyond this, and hold that it has an ***automatic effect*** on either the burden of production (*supra*, p. 105), the burden of persuasion (*ibid*), or both.

   a. **Burden of production:** Thus some states, including Pennsylvania, hold that once *res ipsa* applies, the burden of production is ***automatically shifted*** to the defendant. To put it another way, the mere application of the doctrine constitutes a ***presumption*** of the defendant's negligence. Then, unless the defendant comes forward with rebuttal evidence (e.g., evidence showing his own due care, or showing the plaintiff's interference), he will lose. Putting the matter in terms of the diagram on p. 104, these courts hold that once the plaintiff establishes the doctrine's applicability, the case automatically moves to Zone 3, and it is up to the defendant to move it back to Zone 2 or 1.

      i. **California view:** California's Evidence Code seems to follow this view. Evidence Code §646(b) states that "The judicial doctrine of *res ipsa loquitur* is a presumption affecting the burden of producing evidence." In *Newing*, *supra*, p. 113, it is not clear whether the court held that the requirements for *res ipsa* had been so convincingly demonstrated that reasonable men could not differ on any of them (in which case all jurisdictions would have ordered a directed verdict), or held merely that the plaintiff had met each requirement by a preponderance of the evidence, thereby shifting the burden of production to the defendant, who never met it. If the court was doing the latter, then this result would not be followed by the majority of jurisdictions.

   b. **Burden of proof:** An additional small minority of courts hold that once *res ipsa* applies, the ***burden of persuasion*** is shifted to the defendant. That is, the defendant must then prove by a preponderance of the evidence that he did not negligently cause the plaintiff's harm. See Prosser, p. 230.

   c. **Historical explanation:** These extended effects given by some courts to the *res ipsa* doctrine have a historical explanation. When the doctrine first emerged in the nineteenth century, it was often applied to cases involving ***common carriers***. Such carriers had always been held to bear the burden of exercising the highest possible standard of care for their passengers, and

had also generally borne the burden of persuasion (i.e., the burden of demonstrating by a preponderance of the evidence that they were not negligent). The rules on carriers, and the general *res ipsa* rules, became intermingled, leading some courts to apply a presumption, or to shift the burden of persuasion, in all *res ipsa* cases. However, there has been a recent tendency to reject these extensions, and to hold that the doctrine by itself ordinarily does not supply anything more than an inference of negligence which will get the plaintiff to the jury. Prosser, p. 231.

I. **Effect of pleading or proving specific negligence:** In most or all of the cases we have examined so far, plaintiff neither alleged nor proved ***specific acts of negligence*** by the defendant, but relied solely on a general *res ipsa* theory. May *res ipsa* also be used where a specific negligent act by the defendant is either pleaded or proved? The problem of pleading is slightly different, but related, to the problem of proof.

1. **Pleading:** If the plaintiff ***pleads*** only a specific act of negligence, and makes no general allegations of negligence, the fairer view (see Prosser, p. 233), and that accepted by many if not most courts, is that *res ipsa* may be used to support an inference that the specific negligent act pleaded occurred, but ***not*** to support an inference of any other negligent acts.

   ★ **Example:** D, a surgeon, removes a tumor from P. After the operation, P begins to hemorrhage. D tries a number of measures to stem the bleeding, and finally packs a coagulant called Surgicel next to P's spinal column. This stems the bleeding, but P is paralyzed. P's pleading alleges only two acts of negligence by D: first, that it was negligent for D to put the packing against P's spine, and second, that D negligently failed to warn P of the risks of such treatment.

   Held, *res ipsa* may be applied, if at all, only to support an inference of D's negligence in placing the packing against P's spine, and not to support an inference of any other acts of negligence by D (e.g., negligent performance of the operation itself). Furthermore, to have the doctrine apply to the specific act of negligence alleged, P must demonstrate that paralysis in a case involving packing against the spinal column is more likely than not to be the result of negligence. P showed by expert testimony that such paralysis rarely occurs, but that is irrelevant; the question is whether, when the rare injury does occur, it is usually the result of negligence. This P failed to show. *Brannon v. Wood*, 444 P.2d 558 (Ore. 1968).

   a. **Both specific and general negligence alleged:** If the pleading alleges both specific acts of negligence and also general negligence, the better view (Prosser, p. 233) is that the doctrine of *res ipsa* should be permitted to support this general allegation of negligence if plaintiff fails to sustain his proof of the specific acts. This is so because the defendant has been fairly placed on notice that negligence in general will be in issue.

2. **Specific proof:** When the plaintiff ***proves*** specific negligent acts by the

defendant, it is generally held that he does not automatically waive his right to the benefit of *res ipsa*. Of course, the plaintiff is bound by his evidence, in the sense that if the plaintiff proves the accident was caused by one particular act, the inference that some other unexplained causes might have been responsible is no longer possible. But to the extent that the specific acts proved are not inconsistent with the general *res ipsa* inference that the defendant negligently caused the accident, the doctrine may still be used. Prosser, p. 232.

J. Defendant's rebuttal evidence: Suppose that the plaintiff, in his own case, establishes the elements of *res ipsa* sufficiently that he would, in the absence of any evidence from the defendant, be entitled to go to the jury. (This, as noted *supra*, p. 113, is the usual effect of application of the doctrine). Now, however, the defendant steps forward with ***rebuttal evidence*** of his own. What is the effect?

1. **General evidence of due care:** If the defendant merely offers evidence to show that he was ***in fact careful,*** this will almost never be enough to put the case back in Zone 1 (*supra*, p. 104), entitling the defendant to a directed verdict. The defendant's evidence will therefore usually simply be enough to prevent a directed verdict against him (unless it is so weak that it does not overcome the plaintiff's particularly convincing satisfaction of the three requirements for *res ipsa*), and it will be up to the jury to decide whether the defendant's evidence is enough to negate the inference of negligence stemming from application of *res ipsa*.

   ★ **Example:** P, while watching a show in D's theater, is hit by a falling piece of glass from a chandelier. D offers evidence showing that the chandelier was very frequently inspected, and that no similar accident had occurred in the previous six years. *Held*, on appeal, D's evidence was insufficient to prevent the case from going to the jury. The jury could properly conclude that P's case (which was no more than a showing that the accident occurred) supported an inference of D's negligence, and the trial court was incorrect in setting aside the jury's verdict for P. *Goldstein v. Levy*, 132 N.Y.S. 373 (N.Y. App. 1911).

2. **Rebuttal of *res ipsa* requirements:** But the defendant's evidence may, rather than merely tending to establish the defendant's due care, directly ***disprove one of the requirements*** for application of *res ipsa*. Thus if the defendant conclusively shows that the accident is not of a sort which normally occurs only as the result of negligence, or shows that all reasonable men must agree that the cause was something other than the defendant's negligence, he will be entitled to a directed verdict. In such a situation, the defendant has really shown that the case is not a *res ipsa* case at all, and the doctrine is out of the case. See Rest. 2d, §328D, Comment o.

ACTUAL AND PROXIMATE CAUSE

Introductory note: Once the plaintiff has shown that the defendant behaved negligently, he must then show that this behavior caused the injury complained of. He must, of course, show first that the defendant's conduct was the actual "cause in fact" of the injury. But even beyond this, he must show that the injury is sufficiently closely related to the defendant's conduct that liability should attach; this requirement is commonly called the requirement of "proximate cause". As will be discussed in this chapter, this requirement usually means that the injury must have been at least a reasonably foreseeable (and not bizarre or extraordinary) result from the defendant's negligence. Although the issues of causation in fact and proximate cause are quite distinct, they are both considered in this chapter.

I. CAUSATION IN FACT

A. General significance: When the plaintiff alleges that the defendant "caused" his injuries, it is pretty clear what he means — that the injuries were the actual, ***factual,*** result of the defendant's actions. In most cases, the question of "causation in fact" is a purely factual one, with few legal or policy issues attached to it.

1. **"But for" test:** In the vast majority of situations, the defendant's conduct is the (or a) cause of the plaintiff's injuries if it can be said that "Had the defendant not so conducted himself, the plaintiff's injuries would not have resulted." This formulation is sometimes known as the ***"sine qua non"*** or ***"but for"*** test. See Rest. 2d, §432, and Illustr. 1 thereto.

   ★ **Example:** A bus owned by D Bus Co. is travelling on the highway, when P, a motorcyclist, suddenly enters the highway from an intersection, right in front of the bus. P is struck and killed. There is some evidence that the bus may have been exceeding the speed limit. *Held*, for D. Whether or not D was speeding has no bearing on the cause of the accident. Since P rode his motorcycle directly in the path of the bus, he would have been hit whether the bus was traveling slightly above or slightly below the limit. *Tennessee Trailways, Inc. v. Ervin*, 438 S.W.2d 733 (Tenn. 1969).

2. **Broad test:** Observe that the "but for" test casts an extremely broad net. Every injury occurring to a plaintiff has thousands of causes, by this standard, since if any of a thousand things happened differently, there would have been no accident. For instance, in a nighttime automobile accident, the fact that one of the drivers worked late at the office that night would be a cause, since had he not, he would not have been at that location in time to be hit by the other car. See Prosser, p. 237, fn. 6.

   a. **Multiple negligence:** It follows that a defendant may not claim that he is not an actual cause of the plaintiff's injury merely because ***some other***

person's negligence also contributed to that harm. This matter is more fully discussed in the material on joint tortfeasors, *infra*, p. 143; the general principle is that each of several joint tortfeasors will be held liable for the entire harm.

★ **Example:** P is a passenger in a car driven by D1. On a stormy night, the car crashes into an unlit truck which has been parked in the middle of the road by D2. There is evidence that D1 was negligent in not seeing the truck, and that D2 was negligent in leaving it parked where and how he did. *Held*, D2 should not be dismissed from the case merely because the accident would not have happened without D1's negligence. "Where separate acts of negligence combine to produce directly a single injury each tortfeasor is responsible for the entire result, even though his act alone might not have caused it." *Hill v. Edmonds*, 270 N.Y.S.2d 1020 (N.Y. App. 1966).

B. Concurrent causes: Inclusive as the "but for" test is, it nonetheless rules out one kind of cause which the courts have generally held does constitute a true cause in fact. This is the situation where two events ***concur*** to cause harm, and ***either one would have been sufficient*** to cause substantially the same harm without the other. To provide for this case, it is generally stated that ***each*** of these concurring events is a cause of the injury, insofar as it would have been sufficient to bring that injury about. See Rest. 2d, §432(2).

★ **Example:** D negligently causes a forest fire. The fire merges with another fire of unknown origin, and the combined fires burn P's property. *Held*, even though P's property would have been burned had D never caused the first fire, that fire must still be regarded as a "material and substantial element" in P's damages, and D is therefore liable for the entire damage. *Anderson v. Minneapolis, St. P. & S. St. M. R. R. Co.*, 179 N.W. 45 (Minn. 1920). See also *Kingston v. Chicago & Northwestern Ry.*, 211 N.W. 913 (Wisc. 1927).

1. **Caveat:** But notice that this rule applies only where ***each*** of the concurrent causes would be sufficient, by itself, to bring about substantially the same harm as occurred. If the defendant's conduct would not have been sufficient, by itself, to do so, but the other concurrent event would have been sufficient, the defendant will not be liable.

2. **Distinguished from apportionable harms:** Also, the rule applies only where the concurrent causes produce a single, ***indivisible***, harm. If the damage caused by one concurrent cause may be separated, analytically, from that caused by the other, the person causing the former will be liable only for that harm. See the discussion of apportioning harm among joint tortfeasors, *infra*, pp. 143-4.

C. Proof of actual cause: The plaintiff bears the burden of proving that the defendant actually caused his injury, just as he must bear the burden of proving the other parts of his *prima facie* case. However, he must demonstrate this actual causation merely by a preponderance of the evidence.

1. **Proof of "but for" aspect:** Thus the plaintiff does not have to prove with absolute certainty that had it not been for the defendant's conduct, the injury would not have occurred. All he has to do is to show that it is ***probable*** that the injury would not have occurred without the defendant's act.

   ★ **Example:** P, a 250 lb. woman, falls down an unlit staircase outside of the waiting room of D Railroad. P argues that D's failure to light the staircase was the actual cause of her injury; D contends, however, that P might have fallen even had the stairs been brightly lit. *Held*, P has adequately established actual cause. ". . . Where the negligence of the defendant greatly multiples the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury." *Reynolds v. Texas & Pacific Ry. Co.*, 37 La. Ann. 694 (La. 1885).

2. **Expert testimony:** Sometimes ***expert testimony*** may be necessary to prove actual causation by the defendant. This is frequently true in ***medical malpractice*** cases, where the jury has no knowledge of its own which would permit it to conclude that the defendant's treatment caused the plaintiff's injury.

   ★ **Example:** P, a guest in D's hotel, cuts his forehead on a piece of glass which falls from a broken transom. The injury does not heal, and two years later, a physician tells P that a skin cancer has developed at the point of injury. Two medical experts testify at the trial; one states that there is a remote possibility that a skin cancer could develop from such a wound, and the second declares there is "no causal connection" between P's injury and the cancer. *Held*, for D on the issue of liability for the cancer. A mere possibility that the cancer to P was the result of the injury does not provide the requisite causal connection. The jury should not have been permitted to find D liable for the cancer, since the causes of cancer are outside the experience of laymen, and the only relevant medical evidence, that of the two experts, indicated that it was highly unlikely that the injury caused the cancer. *Kramer Service, Inc. v. Wilkins*, 186 So. 625 (Miss. 1939).

3. **"Double fault and alternative liability":** Generally, as noted, the plaintiff must bear the burden of proving actual causation. In one situation, however, the court may thrust this burden on the defendant (or defendants). This situation has been termed by Prosser that of "clearly established ***double fault and alternative liability".*** Prosser, p. 243. That is, it is where the plaintiff can show that each of two persons was negligent, but that only one could have caused the injury. In this situation, it is, according to most courts, up to each defendant to show that the other caused the harm. See Rest. 2d, §433B(3).

   ★ **Example:** P, D1, and D2 go hunting together. D1 and D2, at the same time, negligently fire at a quail, and P is struck by one of the shots. It is not known from which gun the bullet was fired. *Held*, the burden is on each of the defendants to show that it was the other's shot which hit P. The defendants "brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself

if he can." Otherwise, P might be left remediless. (The court then analogized to the case of *Ybarra v. Spangard*, *supra*, p. 110). *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

a. **Caveat:** In *Summers*, it was established that both defendants had behaved negligently. A few courts have apparently extended this rule of shifting the burden of proof onto the defendants to cases where it is not so clear that all defendants were negligent. For instance, if the plaintiff is injured by one of two cars involved in a collision, and cannot prove which, a court might impose the burden of proof as to causation on the defendants, even if it was not clear that both had been negligent. However, Prosser recommends against such a shift in this situation. See Prosser, pp. 243-4.

II. PROXIMATE CAUSE GENERALLY

A. **Scope of problem:** Suppose that the plaintiff has established that the defendant was "negligent", in the sense that the defendant acted with an unreasonable disregard of the risks his conduct would impose on others. Suppose further that the plaintiff has succeeded in establishing that the defendant's negligence was the "cause in fact" of the plaintiff's injuries. There remains one more major hurdle for the plaintiff — he must show that the defendant ***"proximately"*** caused the injuries.

★ **Example:** P suffers an injury, and claims that the injury would not have occurred without the commission, by D, of a wrongful act. *Held*, to allow liability to be established upon the mere showing that, if the cause had not existed, the effect would not have occurred, is "unsatisfactory". If we were to carry this cause and effect theory to the extreme, one could argue that " . . . if the injured person had never been born, the injury would not have happened." In order to avoid such an absurdity, we must ask whether the act complained of was the "proximate" cause of the injury. *Atlantic Coast Line R. Co. v. Daniels*, 70 S.E. 203 (Ga. 1911).

1. **Misnomer:** This requirement of "proximate cause" is really a misnomer. The word "proximate", when it was first used in this context, meant merely "close in time or space"; yet, as will be seen, this kind of proximity is only one of many factors that go into determining whether the defendant's act was the proximate cause of the plaintiff's injury. Nor does the word "cause" add much — since the plaintiff always has to make a separate showing that the defendant's act was the "cause in fact" of his injury, the limitation on liability imposed by the proximate cause requirement is really not causal at all.

2. **True nature of requirement:** Instead, the proximate cause requirement is a ***policy determination***, arising out of a judicial sense that a defendant, even one who has behaved negligently, should not automatically be liable for ***all*** of the consequences, no matter how ***improbable or far-reaching,*** of his act.

Example: Suppose D, driving carelessly, collides with a car driven by X. Unbeknownst to D, the car contains dynamite, which explodes. Ten blocks

away, a nursemaid who is carrying P, an infant, is startled by the explosion, and drops him.

In this situation, all courts would undoubtedly hold that P could not recover against D. This is not D has not been negligent (since he did impose an unreasonable risk of harm upon X); nor is it because his careless driving was not the cause in fact of P's injury (since without that carelessness, the collision and the explosion would not have occurred). The reason that D will not be liable is simply that the injury is so ***far-fetched*** that courts administering a system based on fault feel it unfair to hold D liable. This feeling is expressed by stating that D's careless driving was not the "proximate cause" of P's injuries.

a. **"Legal cause" better name:** Many writers feel that the term ***"legal cause"*** is a more descriptive label than "proximate cause". The Second Restatement uses the former term; see Rest. 2d, §434(2).

3. **Relation to "cause in fact":** The term "proximate cause" is sometimes used to include the concept of "cause in fact"; that is, in holding that the defendant's conduct was not the cause in fact of the plaintiff's negligence, the court may label this a failure of proximate cause. In this outline, however, the term "proximate cause" is not used to include the idea of actual causation, and encompasses only the restrictions on the defendant's liability for consequences that are deemed unduly far-fetched.

B. **Multiple proximate causes:** Just as an occurrence can have many "causes in fact" (*supra*, p. 117), so it will also often have more than one proximate cause. For instance, if each of two drivers drives negligently and an accident results, it is quite likely that each will be held to be a proximate cause of the accident.

1. **Joint tortfeasors:** In fact, the whole idea of joint and several liability of joint tortfeasors (*infra*, p. 143) is premised on the fact that a tort can have more than one proximate cause, and more than one person legally responsible for it. In general, each possible tortfeasor's actions must be examined, by use of the tests described below, to ascertain whether his acts were so closely related to the resulting damage that he is a proximate cause of it.

III. PROXIMATE CAUSE — THE FORESEEABILITY PROBLEM

A. **Need for dividing line:** Since everyone agrees that the defendant's liability must stop short of the most far-reaching and bizarre consequences, the difficulty is to define exactly where this dividing line should be. It is quite likely that the task of formulating mechanical rules which will apply to all cases is an impossible one, and that the matter must be determined case by case, according to what seems instinctively fair.

1. **Conflicting views:** However, among courts which have tried to resolve the problem, two conflicting views have emerged. One, which might be termed the ***"direct causation"*** view, would impose liability for any harm that may be said to have directly resulted from the defendant's negligence, no matter how

unforeseeable or unlikely it may have been at the time the defendant acted. The other, which could be called the ***"foreseeability"*** or ***"scope of the risk"*** view, would limit the defendant's liability to those results that are of the same general sort that made the defendant's conduct negligent in the first place; i.e., results of a generally foreseeable nature, both as to kind of injury and as to person injured.

2. **"Forseeability" leading contender:** The "foreseeability" view appears to be "on its way to ultimate victory as the criterion of what is 'proximate', if it has not already achieved it." Prosser, p. 267. However, there are certain kinds of cases in which this view does not explain the result which is usually reached by the courts. Therefore, an examination of both views, and the leading cases advocating each, is worthwhile.

B. The "direct causation" view: The ***"direct causation"*** view holds that the defendant is liable for all consequences of his negligent act, provided that these consequences are not due in part to what might be called "superseding intervening causes" (discussed *infra*, p. 130). The most significant aspect of this view, contrasted with the "foreseeability" view, is that the former would hold the defendant liable for all consequences, ***no matter how far-fetched or unforeseeable,*** so long as they flowed "directly" from his act, and not from independent new causes.

1. **Formulation:** One court articulated this view as follows: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but it is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate causes, ***whether he could have foreseen them or not . . . Consequences which flow in unbroken sequence,*** without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow." *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, 69 N.W. 640 (Minn. 1896).

   a. **Alternative formulation:** Or as another court has expressed this view, ". . . Negligence is tested by foresight but proximate cause is determined by ***hindsight***." *Dellwo v. Pearson*, 107 N.Y. 859 (Minn. 1961). The direct causation view is thus sometimes called the "hindsight" theory of proximate cause.

2. **The *Polemis* case:** The most famous case espousing the "direct causation" view ★ is ***In Re Polemis***, 3 K.B. 560 (Eng. 1921).

   a. **Facts:** In *Polemis*, the plaintiffs chartered their ship to the defendants. While the defendants were unloading it at the end of the voyage, they negligently dropped a plank into the hold; the plank somehow struck a spark, and this spark ignited petroleum the ship was carrying. The resulting fire destroyed the ship.

   b. **Holding:** It was clear to the court both that the defendants had acted

negligently in dropping the plank, and that no one could reasonably have foreseen that dropping the plank would strike a spark, let alone burn up the ship. Nonetheless, because the fire was the "direct" result of the negligent act, the defendants were held liable. " . . . If the act would or might . . . cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act. . . ."

c. **Overruled:** The *Polemis* case was, forty years later, overruled in a case known as *Wagon Mound No. 1*, discussed *infra*, p. 124. However, it nonetheless represents a powerful viewpoint, as evidenced by the fact that shortly after *Wagon Mound No. 1*, a case known as *Wagon Mound No. 2*, discussed *infra*, p. 128, very nearly reinstated it.

3. **Rationale:** The direct causation rule of *Polemis* is often attacked on the grounds that it may result in limitless liability.

★ **Example:** D, a railroad, operates one of its engines in a negligent manner. The engine sets fire to D's woodshed, which in turn causes P's house, located nearby, to be consumed by the fire. *Held*, for D. While the destruction of the woodshed is the "ordinary and natural result" of the negligent operation of the engine, to place liability on D for the destruction of P's house is too remote. "To sustain such a claim . . . would subject D to a liability against which no prudence could guard, and to meet which no private fortune would be adequate." *Ryan v. New York Central R. R. Co.*, 35 N.Y. 210 (1866).

a. **Who should bear the loss:** However, proponents of the *Polemis* view observe that where the issue arises, the injury has already occurred, and "the simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or guilty." *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349 (1871).

b. **Further support:** Further support for this rule stems from the fact that in most cases of far-reaching harm from a single negligent act, the defendant is a large corporation, government, utility, etc., which by ***adjusting its prices, obtaining insurance,*** or by some other means, is better able to bear the burden of compensation than the plaintiff, who normally had no reason, or ability, to guard the economic consequences of such a loss. Prosser, p. 257.

c. **Additional consideration:** Furthermore, the imposition of extended liability does not really impose a higher burden of ***conduct*** upon the defendant. By hypothesis, he has been negligent in some respect toward some person; therefore, we are only asking him to bear the consequences of his negligence, not to conform to a standard of conduct higher than that which would be observed by the "reasonable man". Prosser, *ibid.*

C. **The foreseeability view:** The opposite view is one which seeks to apply the same factors to limit the scope of liability as are used to determine whether the conduct is negligent in the first place. That is, this view would make the defendant liable, as a

general rule, only for those consequences of his negligence which were ***reasonably foreseeable*** at the time he acted.

1. ***Wagon Mound* case:** This view is clearly articulated in a case usually called ★ ***Wagon Mound No. 1***, A. C. 388 (Austral. 1961), which purportedly overruled the decision in *Polemis*, *supra*.

   a. **Facts:** In *Wagon Mound*, the defendants' ship spilled oil into a bay. Some of the oil adhered to the plaintiffs' wharf, slightly interfering with the wharf's use. (The interference was so slight that no damage claim was made for it.) Then, however, the oil was set afire by some molten metal dropped by plaintiffs' workmen, which ignited a cotton rag floating on the water. Because of this, the whole dock burned.

   b. **Unforeseeable result:** The trial court found that it was not reasonably foreseeable to the defendants that the oil could be set afire on the water. The burning of the wharf was therefore also an unforeseeable result of the spillage.

   c. **Holding:** The appeals court held that, in these circumstances, the defendants were ***not liable.*** The court rejected the rule of *Polemis*, whereby any consequences, no matter how far-reaching, were laid at the defendant's door, simply because they were the "direct" result of his negligence: ". . . It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial unforeseeable damage the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be 'direct'."

   d. **Application of foreseeability rule:** The court pointed out that it was both simpler, as well as less burdensome to defendants, to apply the same rule to the question of the scope of liability as is applied to determining whether the conduct is negligent to begin with, i.e., whether the result was foreseeable.

2. **Unforeseeable plaintiff:** *Wagon Mound* involved a plaintiff as to whom the defendant's conduct was clearly negligent in a trivial respect (minor interference with the use of the dock), and the question was whether the defendant should also be charged with more serious, but far-fetched, injury suffered by this same plaintiff. A slightly different kind of situation, but one involving much the same issue, might be termed the ***"unforeseeable plaintiff"*** problem. Suppose the defendant's conduct is negligent as to X (in the sense of imposing an unreasonable risk of harm upon him), but not negligent as to P (i.e., not imposing an unreasonable risk of harm upon P). If P is nonetheless injured through some fluke of circumstances, may he in effect "tack on" to the negligence against X, and establish the defendant's liability for his injuries?

   a. ***Palsgraf*:** This question was posed, and answered in the ***negative,*** by the ★ most famous American tort case of all time, ***Palsgraf v. Long Island R. R. Co.***, 162 N.E. 99 (N.Y. 1928).

      i. **Facts of *Palsgraf*:** In *Palsgraf*, a man running to board the

defendant's train seemed about to fall; one of the defendant's employees, attempting to push him onto the train from behind, dislodged a package from the passenger's arms. The package, unbeknownst to anyone (except perhaps the passenger) contained fireworks, which exploded when they fell. The shock of the explosion made some scales at the other end of the platform fall down, hitting the plaintiff.

ii. **Issue:** It was clear from the facts of the case that, although the defendant's employee may have been negligent toward the package-carrying passenger (by pushing him), his conduct did not involve any foreseeable risk of harm to the ***plaintiff,*** who was standing far away. The issue was whether, given the fact that the defendant had been negligent toward someone, this negligence was enough to give rise to liability to the plaintiff, injured by fluke.

iii. **Holding:** The court, in a decision by Judge Cardozo, held that the defendant was ***not liable***. "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in this situation gave notice that the fallen package had in it the potency of peril to persons thus removed. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." Furthermore, generally speaking, ". . . [A] wrong is defined in terms of the natural or probable, at least when unintentional."

iv. **"Negligence in the air":** Since the defendant's conduct did not involve an unreasonable risk of harm to the plaintiff, and the damage to her was not foreseeable, the fact that the conduct was unjustifiably risky to someone else is irrelevant. "Proof of negligence in the air, so to speak, will not do."

v. **"Duty" formulation:** The majority opinion phrased its rule in terms of "duty", more than "foreseeability". The question, the court said, was whether the defendants had a duty of care to the plaintiff which was violated by their acts. But this formulation simply poses the same question as to the scope of liability; if the rule is that a defendant will be liable only to a plaintiff as to whom his conduct imposed a foreseeable risk, it will also be the case that the defendant violated no duty to a plaintiff as to whom there was no foreseeable risk. Phrasing the question in terms of duty does, however, have the advantage of not making the question sound like one of factual causation when it is really one of policy. See Prosser, pp. 250-251.

b. **Dissent:** A famous dissent by Judge Andrews put forth the opposing view (roughly similar to the "direct causation" view discussed above), in what many believe is a more convincing opinion than Cardozo's majority one. The defendant, like every member of society, bears a burden of due care, a burden to "protect ***society*** from unnecessary danger, not to protect A, B or C alone." When an act imposing an unreasonable risk of harm to "the world at large"

occurs, "Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone."

i. **Limitation of convenience:** The Andrews dissent recognized a need to cut a defendant's liability short of all possible consequences which might stem from his negligent conduct. However, Andrews' limit was not determined by the foreseeability of these consequences, but by a more nebulous test: "What we . . . mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."

ii. **Factors:** Andrews did, however, list some of the factors which he thought courts should consider in determining whether the consequences are so remote that liability should not attach. These included whether there was a "natural and continuous sequence" between cause and effect, whether there was a "direct connection" between them, without "too many intervening causes", whether the result was "too remote from the cause, and here we must consider remoteness in time and space", etc. In any event, Andrews argued, the court in *Palsgraf* should not rule on the record before it that the defendant's negligence was not the proximate cause of the plaintiff's injuries.

c. **Relevance to *Wagon Mound* problem:** Observe that the "unforeseeable plaintiff" problem, posed by *Palsgraf*, is extremely similar to the issue posed by *Wagon Mound* (in which a single defendant is subjected to an unreasonable risk of trivial injury, which in fact occurs, as well a risk of more serious damage, which damage is so unlikely as to be "unforeseeable", but which nonetheless occurs.)

i. ***Wagon Mound* view:** The *Wagon Mound* court itself thought that these two issues must be resolved by the ***same test.*** Suppose, the *Wagon Mound* court said, there were two plaintiffs, each of whom had suffered the same unforeseeable injury as the result of a single act by the defendant. It would be unjust to allow one to recover and not the other, merely on the grounds that the former had coincidentally suffered some trivial, but foreseeable, damage from the defendant's action. Thus in the view of the *Wagon Mound* court, and probably in the view of both sides in *Palsgraf*, the same test, whether "foreseeability" or "direct causation" is chosen, should be applied to both the plaintiff unforeseeably damaged by an act which constituted negligence towards someone else, as well as a plaintiff who suffers both foreseeable and unforeseeable injury from a single act by the defendant.

D. **Cardozo rule generally followed:** Cardozo's position has been generally followed by American courts, although only a few cases have involved precisely the *Palsgraf* problem. Prosser, p. 256. However, there are a number of recurring situations in

which the Cardozo view, that only foreseeable consequences may be recovered for, is ***not*** usually followed. Several of these are summarized here:

1. **Extensive results from physical injuries:** Once the plaintiff suffers any foreseeable impact or injury, even if relatively minor, it is universally agreed, even by courts following the foreseeability rule, that the defendant is liable for ***any additional unforeseen physical consequences*** (provided these do not stem from "intervening causes" so unlikely that they should supersede liability — see *infra*, p. 138).

   a. **Plaintiff with egg-shell skull:** This principle is most frequently illustrated by the hypothetical case of a plaintiff who, unbeknownst to the defendant, has a ***skull of egg-shell thinness.*** If the defendant negligently inflicts a minor impact on this skull, but because of this hidden defect, the plaintiff dies, the defendant will be liable for this death. See Prosser, p. 262. The rule is sometimes expressed by saying that the defendant ***"takes his plaintiff as he finds him."*** See *Watson v. Rinderknecht*, 84 N.W. 798 (Minn. 1901), holding that the defendant is liable for unforeseen consequences arising out of a negligent infliction of personal injury.

   ★ **Example:** D, a taxicab driver, negligently strikes P, an alcoholic, with his cab. The accident hastens the development of delirium tremens, a condition which only occurs in alcoholics, and P dies from it. *Held,* for P. Even though the delirium tremens probably would have resulted in P's death at a later time had D not injured P, D is nonetheless liable, since he negligently aggravated P's condition. *McCahill v. New York Transp. Co.,* 94 N.E. 616 (N.Y. 1911).

      i. **Rationale:** Since the initial physical injury in these "thin skull" cases was foreseeable, the holding that the defendant is liable for the far-reaching physical consequences might be explained as simply a refusal by the courts to divide an essentially indivisible physical harm into foreseeable and unforeseeable components. But Prosser suggests (p. 262) that these decisions are really more a function of courts' tendency to carry liability further in cases of personal injury than in cases involving property damage or other, even more abstract, economic loss.

      ii. **Intentional torts:** This tendency is analogous to the tendency referred to previously (*supra*, p. 9) of courts to impose broader liability for unlikely consequences in the case of intentional torts than in the case of negligent ones. This all points up the fact that tort law is largely an instrument of what courts perceive as justice and social planning, and not so much a series of strict legalistic rules of physical causation and compensation.

2. **Rescuers:** The "foreseeability" rule also seems frequently not to be strictly applied where the plaintiff is a ***rescuer*** of one who is endangered by the defendant's conduct, and the rescuer is himself injured. These cases are discussed *infra*, p. 135, in the treatment of intervening causes; here, it suffices to say that the intervention of the rescuer is often not truly foreseeable, but this has not stopped the courts from imposing liability.

3. **Foreseeable but highly unlikely:** The foreseeability rule has also been weakened by cases holding that as long as the actual harm to the plaintiff was ***remotely foreseeable***, there is liability even though these consequences were highly unlikely.

   ★ **Example:** The same facts as *Wagon Mound No. 1, supra*, p. 124. This time, however, the suit is brought by the owner of two ships which were docked at the wharf which burned; the defendant is the same as in *Wagon Mound No. 1*. Here, however, there is a finding of fact that it should have been foreseeable to the defendant that discharge of oil posed ***some small risk of fire.*** *Held*, it does not follow from *Wagon Mound No. 1* that merely because the risk was small, the defendant was justified in ignoring it. The defendant should have weighed the risk against the difficulty of eliminating that risk, and avoiding the spillage would have been so unburdensome that it should have been done. Therefore, the defendant is liable. *Wagon Mound No. 2*, 1 A.C. 617 (Austral. 1966).

   Note: Observe that the court here has taken the Learned Hand "balance the risk against the burden" analysis for determining negligence (*supra*, p. 77), and applied it for determining scope of liability. But it is hard to know how far the court meant to go — does liability only extend as to those consequences which by themselves were sufficiently likely and severe, in view of the small burden of avoiding them, that the defendant should have acted differently? Or does it apply to ***any*** consequence that is remotely foreseeable, even if the risk of that consequence was, by itself, not sufficient to justify the defendant's taking measures to avoid it (and the act was negligent only because of the risks of other consequences that did not materialize)? If the court meant the latter, then Prosser seems to be correct in saying that the effect of this case is to "let the *Polemis* case in again by the back door, since cases will be obviously be quite infrequent in which there is not some recognizable slight risk. . . ." (Prosser, p. 266).

4. **General class of harm but not same manner:** The courts have also cut back on the apparent rationale of *Palsgraf* by holding that as long as the harm suffered by the plaintiff was of the ***same general sort*** that made the defendant's conduct negligent, it is irrelevant that this harm occurred in an ***unusual manner.***

   Example: D gives a loaded pistol to X, an 8-year-old, to carry to P. In handing the pistol to P, X drops it, injuring the bare foot of Y, his playmate. The fall sets off the gun, wounding P. D is liable to P, since the same general kind of risk that made D's conduct negligent (the risk of accidental discharge) has materialized to injure P; the fact that the discharge occurred by means of an unforeseeable dropping of the gun is irrelevant. D is not liable to Y, however, since his foot injury was not foreseeable, and the risk of it was not one of the risks that made D's conduct initially negligent. See Rest. 2d, §281, Illustr. 3.

5. **Plaintiff part of foreseeable class:** Similarly, it has been held that the fact

that injury to the particular plaintiff was not especially foreseeable is irrelevant, so long as the plaintiff is a ***member of a class*** as to which there was a general foreseeability of harm. Both this rule, and the rule just mentioned (that the harm must merely be of the same general class as that the risk of which made the defendant's conduct negligent), are illustrated by the following well-known case.

★ **Example:** D1, a shipping company, negligently moors its ship at a dock run by D2. Ice and debris force the ship adrift, and it collides with another ship, which is properly moored. Both ships smash into a drawbridge run by D3, the City of Buffalo, which might have been able to raise the bridge except for the fact that its employees were not on duty at the time. The bridge is toppled, and a dam is created by the collapsed bridge, the two ships, and floating ice. A flood results, and suit is brought by the various owners of flooded riparian property.

Held, all three defendants are liable to the property owners. First, the fact that it would have been impossible to identify in advance precisely which property owners would be harmed is irrelevant; a loose ship surely poses a danger to river-bank property owners in general, and the failure to raise a drawbridge similarly threatens at least some owners, if only those whose property might be harmed by having the bridge tower fall on them. Since all of the plaintiffs were members of this general class of river-bank property owners, they are within the scope of risk, and are not barred from recovery by *Palsgraf*. Furthermore, the defendants may not succeed with their argument that there is no liability because the precise manner of the accident (i.e., flood damage from the backing up of ice due to the draw bridge's blocking the stream) was not foreseeable. There was a general, foreseeable, risk that a loose ship would injure adjoining property, and that a drawbridge's failure to be raised would similarly damage adjoining owners. ". . . Where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability." *Petition of Kinsman Transit Co. ("Kinsman No. 1")*, 338 F.2d 708 (2d. Cir. 1964).

a. Economic damage: But, as a demonstration of the fact that decisions on such questions of proximate cause are usually made by reference to common sense and fairness, not strict legal principles, another damage claim arising out of the same occurrence was denied in what is usually referred to as *"Kinsman No. 2"*, 388 F.2d 821 (2d. Cir. 1968). In that case, suit was brought by shippers of wheat who were unable to get the ship carrying their wheat to a grain elevator for unloading, due to destruction of the drawbridge. The court held that the connection between the defendant's negligence and the plaintiff's damages was "too tenuous and remote to permit recovery." The court quoted Judge Andrews' dissent in *Palsgraf*, that "it is all a question of expediency . . . of fair judgment. . . ."

E. Restatement "extraordinary in hindsight" rule: The Second Restatement has

formulated a rule of proximate cause that might be described as in between the "foreseeability" and the "direct causation" rules. The defendant's conduct will not be the "legal cause" (the Restatement's substitute for "proximate cause") of the plaintiff's harm where "after the event and ***looking back*** from the harm to the [defendant's] negligent conduct, it appears to the court ***highly extraordinary*** that it should have brought about the harm." Rest. 2d, §435.

1. **Explanation:** The court, in determining whether the result is so "extraordinary" that liability should not be imposed on the defendant, must consider all the circumstances which existed at the time of the defendant's act, even facts of which the defendant was ***unaware.***

   a. **Unforeseeability irrelevant:** For instance, if the defendant inflicts a slight cut on the plaintiff's leg, and the plaintiff is suffering from a rare infection that is aggravated by the cut, the court will, looking backward, take this infection as a given, and will therefore probably not find it so extraordinary that the cut led to extensive injury. It will do so notwithstanding the fact that these consequences were completely unforeseen and unforeseeable to the defendant (and perhaps even to the plaintiff.) Rest. 2d, §435, Comment d. (Depending on the court's view of "extraordinariness", the Restatement test may be as broad and sweeping as the "direct causation" test.)

III. PROXIMATE CAUSE — INTERVENING CAUSES

A. Nature of intervening cause: Questions of proximate cause arise particularly frequently in cases where the plaintiff's injury is precipitated by what is generally called an ***"intervening cause".*** An intervening cause is a force which takes effect ***after*** the defendant's negligence, and which contributes to that negligence in producing the plaintiff's injury. Rest. 2d, §441(1).

1. **Superseding cause:** Some, but not all, intervening causes are sufficient to prevent the defendant's negligence from being held to be the proximate cause of the injury. Intervening causes of this kind are usually called ***"superseding causes"***, since they supersede, or ***cancel,*** the defendant's liability. See Rest. 2d, §440.

B. Foreseeability rule: In general, the issue of whether a particular intervening cause is a superseding one (i.e., one which prevents the defendant's act from being the proximate cause of the plaintiff's injury) is determined by the application of a test much like the Cardozo "foreseeability" test, described above.

1. **Test:** That is, if the defendant should have foreseen the possibility that the intervening cause (or one like it) might occur, ***or*** if the ***kind of harm*** suffered by the plaintiff was foreseeable (even if the intervening cause was not itself foreseeable) the defendant's conduct will nonetheless be the proximate cause.

   a. **No liability:** But if ***neither*** the intervening cause nor the harm was foreseeable (or "normal", a somewhat watered-down version of foreseeable),

the intervening cause will be a superseding one, relieving the defendant of liability. Prosser, p. 272.

C. **Foreseeable intervening causes:** There are situations in which the risk of a particular kind of intervening cause is the ***very risk*** (or one of the risks) which makes the defendant's conduct negligent in the first place. (Recall that the issue of proximate cause never arises until it is established that the defendant's conduct was negligent, in at least some way toward some person.) When this is the case, the intervening cause will virtually never relieve the defendant of liability. See Rest. 2d, 442A.

★ **Example:** P is killed when the roof of D's foundry falls on him. This accident occurs during a gusty wind; there is dispute about whether the wind was truly extraordinary, or rather of a velocity which occurs regularly, once or twice a year. P alleges that D was negligent in not maintaining the roof in a safe condition; D argues that even if this is so, the high wind was an intervening cause which relieved him of liability. The jury finds for P. *Held*, on appeal, the jury could properly have found that the wind, although great, was not so extraordinary that it could not have been foreseen or provided against. (There was no evidence that a stronger roof wouldn't have withstood the storm.) The verdict therefore must stand. *Kimball v. Mackintosh Hemphill Co.*, 59 A.2d 68 (Penn. 1948).

Note: Observe that in *Kimball*, if the defendant's maintenance of the roof was negligent, it was negligent precisely because of the risk that some force of nature, of which a high wind is a prime example, might produce damage. This case is therefore a classic example of the principle that if the risk of a particular intervening force is one of the risks which makes the defendant's conduct negligent, the existence of that intervention will not relieve the defendant of liability.

1. **Illustration of scope of risk:** When courts hold that an intervening cause is not superseding because the risk of that intervention was one of the things that made the defendant's conduct negligent, they are really collapsing the concept of proximate cause into that of negligence. This is illustrated by the following Example.

★ **Example:** P is riding as a passenger in a car driven by X. A fuel truck driven by an employee of D Oil Co., coming in the opposite direction, skids and blocks the road; X swerves to avoid it, and ends up off the highway. Because the accident occurs near the top of a hill, P gets out of the car to warn drivers coming up the hill from the other direction. While doing so, he is hit by an oncoming car.

Held, D's negligence is the proximate cause of P's injury. D's basic act of negligence towards P was in endangering him during the initial near-collision. But one of the extra risks of D's conduct was that P would do exactly what he did, namely, try to warn other motorists. (The court noted that if P had gotten back in the car, and had an accident five miles down the road, D's negligence would not have been the proximate cause because,

despite the fact that P would not have been at the fatal intersection had it not been for D's conduct, that conduct would not have increased the risk of the five-miles-down-the-road collision.) P's injury was therefore "not remote, either in time or place", from D's negligence, and D is liable. *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955).

2. **Acts of nature generally:** As *Kimball, supra,* indicates, if the act of nature was truly "extraordinary", and not foreseeable, it will often be held to be a superseding cause. But one exception to this principle is that if the extraordinary, unforeseeable, act of nature (or ***"act of God"***, as such catastrophes are often called, particularly in insurance policies) merely produces the ***same result*** as was threatened in other ways by the defendant's negligence, the defendant may still be liable. The general rule that the defendant is liable in cases of "unforeseen intervening causes but foreseeable result" is discussed *infra*, p. 137.

3. **Risk of harm must be increased:** For the defendant to remain liable under this "foreseeable intervening cause" rule, it is not enough that the intervening cause was foreseeable. It must also be the case that the ***risk of harm*** due to this force was ***increased*** by the defendant's conduct.

   Example: P is in the middle of a long drive, throughout which there is a lot of thunder and lightning. In the middle of the trip, D carelessly smashes into a tree, blocking P's path. While P is waiting, his car is struck by lightning. D will be held not to be the proximate cause of P's injury. It is true that the lightning is somewhat foreseeable. It is also true that D is a "but for" cause of P's injury, in the sense that had D not blocked P's route, D would have been somewhere else. But P was just as likely to be hit by lightning a few miles further down the road, where he would have been had there been no accident. Thus D's conduct has not increased the risk of damage to P through the foreseeable intervening cause. See Prosser, p. 275. See also *Marshall v. Nugent, supra.*

4. **Negligence of others:** The ***negligence of third persons*** may also be an intervening force that is sufficiently foreseeable that it will not relieve the defendant of liability. As was noted previously (*supra*, p. 87), the negligence of others is, in some situations, sufficiently foreseeable that it is negligence on the part of the defendant not to anticipate it and guard against it. In such a situation, it is not surprising that when the third person's negligence does occur, the defendant will be held to be a proximate cause of damage that was immediately precipitated by the third person's conduct.

   a. **Liquor sales:** This is the theory behind holding ***tavern owners*** liable for accidents caused by patrons who have been served too much liquor. Many states accomplish this result by statutes known as ***Dram Shop Acts***, which make commercial sellers of liquor statutorily and automatically liable for such accidents if they have served a person who they should have realized was already intoxicated. But this result is also sometimes reached by the court acting without a Dram Shop statute

      Example: D, a tavern owner, serves liquor to X, a minor who already

appears intoxicated. X then drives home, and negligently crashes into P's car, killing him. The state has no Dram Shop statute. The jury finds for P. *Held*, on appeal, the jury could reasonably find that P's injuries resulted in the "ordinary course of events" from D's negligence, and that X's negligent driving was a "normal incident of the risk" created by D. Therefore, the jury's verdict, with its implicit finding that D's conduct was the proximate cause of P's injury, must be sustained. *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1959).

i. **Social furnishing of liquor:** A number of states have concurred with the result reached by the New Jersey Supreme Court in *Rappaport*, in holding that civil liability for drunk driving accidents may be imposed on tavern owners, even in the absence of a Dram Shop Act. But where the defendant is not a commercial tavern or liquor store owner, but one who serves liquor ***socially*** or as part of ***business entertainment***, most states have not been willing to impose common law liability.

★ **Example:** D, a corporation, furnishes free liquor to people at the company Christmas party. X, a known alcoholic and an employee of D, becomes intoxicated, but D continues to provide him with drinks. As X drives home, he strikes P. *Held,* D is not liable for the accident, because it was not the proximate cause of that accident. While the legislature has created liability in the case of " . . . a sale of liquor by a regular vendor," it has not done so for the free supplying of alcoholic beverages. The court should not do what the legislature has declined to do. (A dissent argued that the situation was one in which courts could and would allow common-law liability despite the lack of legislative policy.) *Halvorson v. Birchfield Boiler, Inc.,* 458 P.2d 897 (Wash. 1969).

ii. **California finds liability:** But the California Supreme Court has recently held that even a ***social host*** will be liable under common law principles, if he serves an "obviously intoxicated" guest, and an accident ensues. ***Coulter v. Sup. Ct. of San Mateo Cty***, 145 Cal.Rptr. 534 (1978). As a concurrence noted, the same result should follow if the host served the drinks that ***produced*** the intoxication and should have known intoxication would occur. But the majority opinion does not indicate that it would so extend its holding.

iii. **Already drunk:** The same concurrence pointed out that the host should only be liable if the drinks he served to an already-drunk guest ***increased or prolonged*** the existing intoxication and proximately caused the injury. In other words, the host should be off the hook if he can show that the accident would probably have occurred even without the one or two drinks served after obvious intoxication, and that these merely added "a straw to a camel's back previously broken."

5. **Criminal or intentionally tortious conduct:** A third person's ***criminal conduct*** may, similarly, be sufficiently foreseeable that, even though it is clearly an intervening act, it will not be a superseding one. This is also true of ***intentionally tortious acts*** by third persons the risk of which the defendant

could have foreseen. In practice, however, the plaintiff may find it quite difficult to establish that the risk of criminal or intentionally tortious intervention was so great that it should have been guarded against.

★ **Example:** D Railroad negligently derails a tank car full of gasoline, and the gasoline spills into the street. X then throws down a lighted match, which ignites the gasoline, leading to an explosion that injures P. Evidence at trial is conflicting as to whether X was merely negligent in throwing down the match, or rather did it on purpose. *Held*, on appeal, if X acted merely negligently (e.g., by lighting his cigar with the match), D is liable, since the risk of such a casual act by someone was one of the risks which made D's derailment negligent. But if X set the fire intentionally, such an intervention was so unlikely that D could not reasonably have been expected to guard against it. Case remanded for a new trial to determine whether X was negligent or criminal. *Watson v. Kentucky & Indiana Bridge & R.R. Co.*, 128 S.W. 146 (Ky. 1910).

a. **Shifting responsibility:** Courts may also avoid holding the defendant liable for intervening criminal or intentionally tortious acts by holding that responsibility for the plaintiff's harm has ***shifted*** to the intervenor. See the discussion of shifting responsibility, *infra*, p. 141. Thus the court in *Watson*, instead of holding that the intentional-match-throwing was unforeseeable, could have reached the same result by holding that foreseeable or not, this criminal act was so clearly the direct responsibility of X that D should be relieved of liability. See Prosser, p. 287.

D. Weakening of "foreseeable": We saw that in courts following the general "foreseeability" approach to proximate cause, the requirement that the type of harm suffered by the plaintiff have been foreseeable has often been watered-down; this was true, for instance, of the decision in *Wagon Mound No. 2*, *supra*, p. 128, where even a very slight chance that the harm would occur was held to render it foreseeable. A similar weakening of the concept of foreseeability has occurred in cases involving intervening causes; that is, certain intervening causes have been held to be "foreseeable", and thus not superseding, even where the odds that these causes would intervene were very long indeed.

1. **"Normal" intervention:** This watering-down of foreseeability has sometimes been expressed by saying that the intervening cause will not be superseding so long as it is a ***"normal"*** consequence of the defendant's conduct, whether foreseeable or not. See Rest. 2d, §443. This has been particularly true in cases where the intervening cause is a ***response*** to the danger or harm caused by the defendant. This includes cases of attempted ***escape from harm, rescue,*** attempted ***medical treatment,*** and actions taken under emotional disturbance (including ***suicide***).

   a. **Attempted escape from danger:** Thus if, in response to the danger created by the defendant's conduct, the plaintiff or someone else attempts to ***escape*** that danger, thus causing injury to the plaintiff, the attempted escape will not be a superseding cause so long as it was not completely irrational or bizarre.

Example: D, driving on the highway, negligently attempts to pass a car driven by P, even though there is a truck approaching from the other direction. To avoid the threatened collision, P turns the car to the right edge of the highway, and hits a railing. X, a passenger in P's car, foolishly goes into an entirely unreasonable panic, opens the door of the car, and throws out her child, injuring him. P's act will not be a superseding cause relieving D of liability for damage to P's car; this is so because P's act was a "normal" (i.e., not extraordinary) response to the danger. (This is the case even if P's act was contributorily negligent, although this might be a defense that could be asserted by D). X's act is so bizarre and abnormal, however, that it will be a superseding cause, relieving D of liability for the injury to X's child. See Rest. 2d, §445, Illustr. 2 (slightly different facts).

b. Rescue: Similarly, if the defendant's negligence creates a danger which causes some third person to attempt a ***rescue***, this rescue will normally not be an intervening cause, unless it is performed in a ***grossly careless manner.*** Assuming that the rescue is not of this latter class, the defendant may be liable to the ***person being rescued*** (even if part or all of his injuries are due to the rescuer's ordinary negligence), or to the ***rescuer*** (if he is injured in his rescue attempt).

i. Foreseeability: Some cases have held the rescuer not to be a superseding cause on the theory that the rescue was "foreseeable". The most notable such case is *Wagner v. International Railway*, a decision of Judge Cardozo set forth in the following Example.

Example: P and his cousin Herbert take an electric railway run by D. As the train is crossing a bridge, it lurches violently, and Herbert is thrown out. P leaves the train and walks along the bridge, trying to find Herbert's body; in the dark, he falls off the bridge and is hurt. *Held*, D owed a duty to P as well as to Herbert. "Danger invites rescue. The cry of distress is the summons to relief. . . . The risk of rescue, if only it be not wanton, is born of the occasion. . . . The wrongdoer may not have foreseen the coming of a deliverer. He is as accountable as if he had." (However, a new trial must be had to decide, *inter alia*, whether P was contributorily negligent.) *Wagner v. International Railway*, 133 N.E. 437 (N.Y. 1921).

Note: In *Wagner*, the court rejected the defendant's theory that it would be liable to a rescuer only if the rescue was "instinctive". Virtually all modern courts agree that spontaneous, immediate action on the part of the rescuer is ***not*** required. See Prosser, p. 277.

ii. Gross negligence: As noted, if the rescuer's act is ***grossly negligent*** or otherwise ***bizarre***, it will generally be regarded as a superseding cause.

Example: P, a child, is rescued after nearly drowning. A fireman provides a nurse on the scene with Redi-Heat blocks manufactured by D, in order to supply P with warmth to prevent shock. The fireman discards the outer covering of the blocks, and neglects to tell the nurse that that covering

contains a warning that the blocks should never be applied directly to skin. The nurse puts the blocks against P's skin, and she gets burned. At trial, there is additional evidence that the fireman had been instructed in the proper use of the blocks previously. *Held*, if the fireman did in fact have actual knowledge of the need for insulation, and failed to pass that information on, his negligence was so gross that it is superseding (and relieves D of liability), even if D was negligent in not putting a warning on the block itself. *McLaughlin v. Mine Safety Appliance Co.*, 181 N.E.2d 430 (N.Y. 1962).

c. **Aggravation of injury:** A similar line of cases holds that if the defendant negligently injures the plaintiff, and as a result of that injury the plaintiff receives a further injury or an ***aggravation*** of the existing one, the defendant is liable for all of this.

i. **Medical treatment:** Thus if the defendant injures the plaintiff, who then undergoes ***medical treatment,*** the defendant will be liable for anything that happens to the plaintiff as a result of negligence in the medical treatment, infection, or other by-products. Some results of attempted medical treatment are, however, so gross and unusual that they are regarded as superseding. The Second Restatement illustrates this by the example of a nurse who is unable to bear the plaintiff's suffering, and kills him by an injection of morphine which she knows may be fatal. (Rest. 2d, §457, Illustr. 4).

ii. **Most malpractice not superseding:** But most of the things that can go wrong in medical treatment are not superseding causes. For instance, if the plaintiff is injured when the ***ambulance carrying him gets into a collision,*** the person causing the initial need for the ambulance will be liable (Prosser, p. 279, fn. 66); similarly, if the plaintiff is hospitalized, and then receives an unnecessary operation due to a ***clerical mixup*** of his records with those of another patient, the defendant who caused him to be hospitalized in the first place will be liable. (Rest. 2d, §457, Illustr. 3).

iii. **Lowered vitality:** Similarly, if the defendant causes the plaintiff to become sick or otherwise weakened, and this weakened state leads the plaintiff to ***catch another disease*** which he might not otherwise have caught, the defendant's liability will extend to the results of this subsequent disease. Rest. 2d, §458.

iv. **Subsequent accidents:** And if the defendant injures the plaintiff, and this injury makes the plaintiff particularly susceptible to ***another accident***, which occurs, again there will be full liability.

Example: D negligently runs over P, breaking his leg. Two months later, as P is learning to walk on crutches, he slips, and breaks his arm. D is liable for injuries to the arm as well as the leg. See Rest. 2d, §460, Illustr. 1. (But if P tried to walk on the crutches down a ladder into his basement, and fell, D would not be liable for this fall; the fall would be such an abnormal

consequence of the original broken leg that it would be viewed as superseding. (*Ibid*, Illustr. 2).)

d. Suicide: What if the plaintiff becomes so despondent or pained by the injuries he has received from the defendant's negligence that he ***kills himself***? If the plaintiff was ***sane*** at the time he committed suicide, the courts unanimously hold that the suicide was a superseding cause, and the defendant has no liability for it.

i. Insanity: But if the injury drives the plaintiff ***insane***, and the suicide is the product of this insanity, recovery is usually allowed. The requisite insanity has generally been found only where the suicide is shown to be the product of an ***"irresistible impulse"*** on the part of the plaintiff. This phrase, however, has acquired a broader meaning in recent years.

★ **Example:** In a car accident caused by D's negligence, P suffers hidden head injuries. He becomes subject to frequent epileptic seizures, becomes depressed, and develops other neurological symptoms. Seven months after the accident, he commits suicide, leaving two suicide notes, one of which refers to the pending case against D as being "worth a million dollars", and which advises that the note be destroyed so as not to jeopardize the case. *Held*, in order for D to be liable for P's death, P's suicide must have been an "irresistible impulse" stemming from his injuries. However, the possibility of such an impulse is not negated by the fact that P himself thought he was sane, since he might have been insane anyway. Remanded for a new trial on the facts. *Fuller v. Preis*, 322 N.E.2d 263 (N.Y. 1974).

E. Unforeseeable intervention but foreseeable result: The "intervening cause" cases examined above were ones in which the intervention was foreseeable, or at least "normal". What if the intervention is neither foreseeable or normal, but it leads to the ***same type of harm*** as that which was threatened by the defendant's negligence? The general tendency in such situations is to hold that the intervention is not a superseding cause. See Prosser, p. 286; see also Rest. 2d, §442B.

1. Rationale: The rationale for this result is that since the defendant has imposed upon the plaintiff an unreasonable risk of the same type of harm as that which occurred, it is unjust to allow him to escape responsibility merely because the harm was in fact produced by an unforeseeable intervention. As Prosser puts it, this result is compelled by "an instinctive feeling of justice." Prosser, p. 286.

★ **Example:** D Transit Co. runs a trolley system, as part of which it maintains wooden poles. It allows one of these poles to become infested by termites. P is standing near that pole when X, negligently driving his car, collides with the pole, knocking it over onto P. *Held*, if the evidence shows that a properly maintained pole would not have broken under the impact of X's car (so that D's negligence is a cause in fact of the injury), X's negligence will not be a superseding cause, even though it was unforeseeable. In order for an intervening act to be non-superseding, " . . . The law does not inevitably require that the precise [intervening] act be foreseeable. . . . If the defendant's conduct exposes persons in the class to

which plaintiff belongs to a foreseeable risk of injury, and his act or omission contributes substantially to injury of that nature actually occurring, he may be held liable notwithstanding the fact that an unforeseeable independent intervening act is a concurring cause." Since the general risk imposed by D's negligence is that the pole would, due to its own weight or outside forces, fall on a bystander, the fact that the actual precipitating cause was unforeseeable is irrelevant. *Gibson v. Garcia*, 216 P.2d 119 (D.C. App. Cal. 1950).

2. **Criminality or intentional tort:** But if the unforeseeable intervening act is a ***crime or intentional tort,*** it ***will*** usually be a superseding cause, even if the injury that results to the plaintiff is the same as that threatened by the defendant's negligence.

   Example: This was the case in *Watson v. Kentucky & Indiana Bridge & R.R. Co.*, *supra*, p. 134, in which the court held that if the explosion of gasoline spilled by the defendant was due to arson on the part of a third person, that arson would be a superseding cause.

   a. **Rationale:** As noted, *supra*, p. 134, the rationale for holding that an intervening intentionally tortious or criminal act is a superseding cause is often that responsibility has ***"shifted"*** to the third-party criminal or tortfeasor. See the discussion of shifting responsibility *infra*, p. 141. See Rest. 2d, §442B, Comment c.

F. Unforeseeable intervention with unforeseeable results: The last major class of intervening causes consists of those interventions which are not foreseeable (or even "normal"), and which produce results that are not of the same nature as those potential results that made the defendant's conduct negligent. Generally, the courts have treated such intervening causes as superseding. As with the other classes of intervening causes, this result has been reached on basically instinctive feelings of justice; in this case, that it is not fair to hold the defendant liable for a harm that was not within the original risk of his negligent conduct, where that harm was produced through an unforeseeable intervention. See Prosser, p. 281.

1. **Extraordinary acts of nature:** Thus an extraordinary act of nature ("Act of God") which brings about damage to the plaintiff different from the damage threatened by the defendant's negligence, will relieve the defendant of liability. See Rest. 2d, §451

   Example: In a state where it is a tort to build a "spite wall" (i.e., a wall separating one's land from that of one's neighbor), D builds such a wall. The wall is strong enough to withstand any foreseeable winds, but an extraordinary cyclone blows the wall down, damaging the house of P, D's neighbor. The cyclone will be held to be a superseding cause relieving D of liability, since it was not foreseeable or even "normal", and the risk of damage to the land of his neighbor was not one of the risks that made D's original conduct tortious. See Rest. 2d, §451, Comment a.

2. **Other extraordinary acts:** Similarly, intentionally tortious or criminal acts by

third persons, gross negligence by third persons, and other highly unusual intervening causes, have been held to be superseding, where they produce a result different from that the threat of which made the defendant's conduct negligent. See Prosser, p. 282. Several of the more frequently recurring fact situations in which this rule is applied are as follows.

a. **Key-in-ignition cases:** Suppose the defendant leaves his car unlocked, with the ***key in the ignition,*** and a thief steals it, later running down the plaintiff. Is the thief's act a superseding one? In most circumstances, the courts have answered ***"no"***, whether or not there is a local car-locking ordinance. See Prosser, p. 283.

   i. **Rationale:** The rationale for this result can be expressed as follows: First, the risk of the intervening act (if one defines it as not merely the theft of the car, but the subsequent negligent driving of it) is not one of the risks which makes the defendant's conduct negligent. (His conduct is negligent, if at all, because of the danger to the owner's own car.) Secondly, the kind of result (personal injury or property damage to third persons) is not the kind of result that is threatened by the defendant's negligence.

   ii. **Unusual circumstances:** But in a particular case, circumstances may be such that the owner should foresee that leaving the keys in the car will materially increase the risk of harm to others. For instance, in *Hergenrether v. East*, 393 P.2d 164 (Cal. 1964), the car was left in a known skid-row area, with a high crime rate, and the owner was held to have been on notice of the increased danger of theft and ensuing negligence.

   iii. **Negligence per se:** Recall that the car-locking problem arose in the discussion of negligence *per se*, *supra*, p. 99. There, it was noted that statutes requiring car-locking are sometimes held to be for the protection third persons, and violations are held to be negligence *per se* towards a bystander who is injured. Where negligence *per se* is found on this basis, the court will normally conclude also that the theft and the thief's negligence are not superseding causes, since this conduct was somewhat foreseeable and part of the risk that the statute was designed to prevent.

b. **Delays by carriers:** Suppose a ***common carrier*** negligently ***delays the transport of goods,*** leading them to be destroyed by a flood, fire, etc. The delay is clearly the cause in fact of the damage, since had there been no delay, the goods would not have been in the place that was flooded or burned. But unless the plaintiff can show that an ***increase in the risk*** of such a catastrophe was foreseeable as the result of the delay (e.g., the carrier fails to move the goods out of an area where floods have been threatened into a safer one), most courts (and the Second Restatement, §451) would probably hold that the act of nature was a superseding cause.

   i. **Minority view:** Other courts might impose liability on the carrier, but this is more properly viewed as the imposition of strict liability (i.e.,

liability without regard to fault) than as the application of traditional rules of proximate cause and negligence. See Prosser, 285-6.

G. Dependent vs. independent causes: In deciding whether to treat an intervening cause as superseding, courts have often distinguished between ***"dependent"*** intervening causes and ***"independent"*** ones. A dependent intervening cause is one which operates in ***response*** to the defendant's negligence. An independent intervention is one which would have existed even had the defendant not been negligent (but which, in any case in which the defendant's negligence is a cause in fact of the plaintiff's harm, combined with that negligence to produce the harm.)

> **Example:** Suppose D negligently fails to maintain his tires in a safe condition. If he has a blow-out, and this blow-out makes his car swerve in such a way that P, in an oncoming car, tries to avoid him by going off the road and runs into a fence, P's act of avoidance is a dependent intervening cause. But if P had gently bumped into D prior to the blow-out, and this bump had precipitated the blow-out, P's act would be an independent one, since it would have occurred regardless of the condition of D's tires (although the resulting blow-out might not have occurred).

1. **Significance of distinction:** An intervening cause's status as dependent or independent is ***not per se dispositive*** as to whether that intervention is superseding. It may well be that dependent causes are generally more foreseeable than independent ones, and are thus more likely to be superseding. But an independent intervening force can certainly fail to supersede (e.g., the hurricane in *Kimball, supra*, p. 131,which would have occurred regardless of the status of the defendant's roof), and a dependent cause can be superseding (e.g., a grossly negligent rescue attempt, which would not have occurred but for the danger to the rescued person created by the defendant.)

    a. **Distinction not important:** The student should therefore not place too much attention on the "independent" and "dependent" labels, and should instead ask the question, "Did the defendant's conduct increase the risk either that an intervening cause like the one that occurred would occur and bring damage, or that damage like that which occurred would occur?" If the answer is yes, the intervening cause will generally not be superseding.

H. Function of judge and jury: Is it the judge or the jury who decides the issue of proximate cause? It is of course up to the judge to formulate the appropriate legal rule in the form of an instruction. Thus in a jurisdiction following the "direct causation" rule, the instruction might say that the defendant's act was the proximate cause of the plaintiff's harm if the former was a "cause which, in a natural and continuous sequence, produce[d] damage and without which the damage would not have occurred." See Ark. Model Jury Instructions, quoted at P,W&S, p. 359.

1. **Factual decision:** But once the proximate cause standard has been formulated by the judge, the final decision is a factual one (e.g., under the Arkansas instruction, Was there really a "natural and continuous sequence" between defendant's action and plaintiff's harm?) If reasonable men could not differ on

this factual issue, the judge will decide it as a matter of law (see *supra*, p. 107). But in the great majority of cases, a possibility of differing reasonable opinions will exist, and the issue will be ***left to the jury.*** See Prosser, pp. 289-290.

IV. SHIFTING RESPONSIBILITY

A. Nature of problem: We have encountered several times situations where the defendant acts negligently, and this negligence is compounded by the negligence or other wrongdoing of third persons, all of which in combination produces the plaintiff's injury. As has been noted, there are some situations in which the defendant will be allowed to say, in effect, that responsibility for the dangerous condition created in part by him has ***passed to that third person,*** absolving the defendant of responsibility. That is, the responsibility is said to have ***"shifted"***.

B. No general rule: Both Prosser (p. 177) and the Restatement (Rest. 2d, §452, Comment f) agree that it is difficult or impossible to state a general principle about when the responsibility will have shifted. But a few general observations and typical fact situations may be stated.

1. **Contract or other agreement on responsibility:** There may be an ***agreement*** between the defendant and the third person expressly or implicitly shifting responsibility to the latter. Such an agreement will not be dispositive, if there are strong policy considerations in favor of not relieving the defendant of liability. Nonetheless, such an agreement will be a factor making it more likely that the court will find responsibility to have shifted in the manner that the agreement refers to.

★ **Example:** D1, a power company, contracts to supply an electric transformer pole to D2, a village. After installation, the pole is turned over to the village, and the contract expressly provides that the latter assumes all responsibility for inspecting it during the first year, and of both maintaining and inspecting it thereafter. (But the contract does provide that D1 will fix any defect as to which D2 notifies it during the first year.) Nearly a year and a half after installation, two wires on the poles, which were negligently placed too close together by D1, come in contact. This discharges a large burst of electricity, which injures P, a neighboring homeowner. D1 alleges that, since the contract puts the burden of inspection and repair on D2, D1 has no responsibility even if it was negligent in its initial construction.

Held, D1 had "a right to rely upon the [Village's] assuming immediately upon its acceptance of the work, the duty of inspection and maintenance. . . ." First, the contract demonstrates that the Village assumed this burden. Secondly, if D1 is to be liable after a year and a half, why should it not be liable after ten years, or indefinitely? The correct conclusion must be that D1, if negligent, was relieved of liability by the passage of time and the Village's neglect. *Goar v. Village of Stephen*, 196 N.W. 171 (Minn. 1923).

2. **Cases where there is no agreement:** Where there is no agreement between the defendant and the third person regarding apportionment of responsibility, the court must make an even more abstract weighing of factors. Among these are the degree to which the defendant should have ***foreseen*** that the third person might be negligent, the ***severity*** of the harm which would result if such negligence by the third person occurred, and the ***lapse of time.*** See Rest. 2d, §452, Comment f.

3. **Third person's failure to discover defect:** One rule that is well-established is that if a manufacturer negligently produces a dangerous product, he will ***never*** be absolved of responsibility merely because some person further down the distributive chain (e.g., a distributor or a consumer who resells the product) negligently ***fails to discover the danger,*** and thus fails to warn the plaintiff (the ultimate user) about it. See P,W&S, p. 369, Note 2.

   a. **Discovery of defect:** But if the third person does ***discover*** the defect, and then willfully or negligently fails to warn the plaintiff, the case is harder to decide. In general, in this situation, the defendant is required to take ***all reasonable steps*** to remedy the danger caused by his original negligence, and it will probably not be enough for him to rely on the third person to pass on warnings of the defect.

   ★ **Example:** D1 manufactures a plastic molding press and sells it to D2. D1 then learns that the press has a dangerous tendency to crush the hands of people using it, and that it violates state safety laws. D2 sells the machine to D3, and D1 (which knows about the sale to D3 through repair records) offers to D3 to put a safety device on the machine for $500. D3 declines, and P, its employee, gets her hand crushed. D1, of course, claims that the employer's refusal to allow installation of the safety device shifted responsibility to it.

   Held, D3 was not liable because P is limited to workmen's compensation. D2 is not liable, because it in fact attempted to deal with the danger by installing a safety switch before selling the machine to D3. D1's liability is a jury question. D1 was required to take all reasonable steps to prevent injuries to persons using its machine. It was an issue of fact whether D1's offer to fix the machine, but only for a $500 fee, constituted such a reasonable attempt. (The court distinguished a case in which a refusal by the original owner of a car to accept a manufacturer's offer of ***free*** repair of a defect relieved the manufacturer of liability to a subsequent owner injured due to the defect. That case is embodied as Rest. 2d, §452, Illustr. 10). Therefore, the trial judge erred by dismissing the suit against D1 as a matter of law. *Balido v. Improved Machinery, Inc.*, 105 Cal. Rptr. 890 (Cal. Ct. App. 1973).

JOINT TORTFEASORS

Introductory Note: It may happen that more than one defendant is liable for some or all of the harm suffered by the plaintiff. This chapter first examines some of the circumstances in which this can happen. It then discusses various ways the monetary liability can be parcelled out among the defendants, both with respect to direct liability to the plaintiff, and with respect to liability of the defendants to each other.

I. JOINT LIABILITY

A. Joint liability for concurrent wrongdoing: The chapter on proximate cause was replete with cases in which more than one person behaved negligently, or otherwise wrongfully. When this is the situation, may the plaintiff recover against all of them, and if so, in what amounts relative to his overall injury?

1. Joint liability for indivisible result: First, it is necessary to determine whether each of the defendants was a proximate cause of the plaintiff's harm. (Recall that, as stated *supra*, p. 117, the plaintiff's harm may have more than one proximate cause, i.e., more than one event which substantially contributed to it, and which is so closely related to it as to give rise to liability.) If more than one person is a proximate cause of the plaintiff's harm, and the harm is ***indivisible***, ***each defendant*** is liable for the ***entire harm***.

a. Consequence: The plaintiff may thus sue and collect from either of them, or both of them (but of course he is only entitled to recover a sum equal to his overall damages — i.e., he cannot collect twice).

★ **Example:** D1 and D2 drive negligently, and collide with each other. As a result of the collision, P is injured. Both Ds claim that the accident was caused by the negligence of the other. *Held*, "Where, without concert, and although there was no common design, the negligences of two or more defendants concur in producing a single indivisible injury, such persons are jointly and severally liable for the whole damage." Therefore, P may recover the entire amount of his damages from D1 or D2. (However, the judgment against D2 is reversed for other reasons.) *Arnst v. Estes*, 8 A.2d 201 (Me. 1939).

b. Choice of recovery: Assuming that appropriate civil procedure rules on joinder exist, a plaintiff like the one in the above example may sue both of the defendants in the same suit, recover a judgment against each, and then at his pleasure decide which of them to collect from (or collect part from one and part from the other).

2. Indivisible harm: But this rule of joint and several liability applies only where the plaintiff's harm is not capable of ***apportionment*** between or among the defendants. If there is a rational basis for saying that some of the harm is the result of one defendant's act, and the remainder the result of the act of the other

defendant, then each will be responsible only for that harm attributable to him. See Rest. 2d, §433A.

B. Method of apportionment: Certain harms are clearly divisible into component parts. The classic illustration is a plaintiff who is shot by each of two defendants, acting independently. If one injures him in the arm, and the other in the leg, each will be liable only for the particular injury he caused.

1. **Action in concert:** But if the two defendants can be said to have acted ***in concert***, each will be liable for injuries directly caused by the other.

   ★ **Example:** D1 and D2 drag-race against each other on a public highway at twice the speed limit. The Ps are traveling in their car towards the speeding racers. D1, unable to steer his car back into the proper lane, collides with the Ps. D2 is not involved in the accident. *Held*, both Ds are fully liable, even though only one actually struck the Ps. " . . . All parties engaged in a motor vehicle race on the highway are wrongdoers acting in concert and . . . each participant is liable for harm to a third person arising from the tortious conduct of the other, because he has induced and encouraged the tort." *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968).

2. **Other divisible harms:** Other kinds of harms are less easily divided than the two gunshot wounds hypothesized above, but it is theoretically possible to do so and more just than holding each defendant liable for the full harm.

   a. **Nuisance:** This has often been true, for instance, in ***nuisance*** cases, where each defendant contributes to the impairment of the plaintiff's use of his land; despite the difficulty of apportioning the harm, the courts have preferred to do so rather than hold each defendant liable for the full amount. See, e.g., *Farley v. Crystal Coal & Coke Co.*, 102 S.E. 265 (W. Va. 1920), holding that where each of several defendant mining companies polluted a river on which plaintiff's farm bordered, plaintiff could recover from each only an amount attributable to his actual contribution to the plaintiff's damage.

   b. **Burden of proof:** In those situations where the harm is theoretically apportionable, but in practice difficult to do so, usually because of difficulties of proof, courts have sometimes ***shifted the burden of proof*** onto the defendants to demonstrate a reasonable allocation of harms. See Rest. 2d, §433B.

      ★ **Example:** The Ps, a group of 37 residents, contend that the Ds, three corporations who own industrial plants, have polluted the air around the Ps' homes. The Ds contend that the Ps may not recover anything, because they cannot allocate responsibility among the various defendants. *Held*, for the Ps. Where, as here, dividing the harm is theoretically possible, but very difficult, the burden of proof as to who is responsible for what is shifted to the Ds. If none of the Ds can produce satisfactory proof as to who is responsible, all will be jointly and severally liable. *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974).

3. **Successive injuries:** One situation in which courts have attempted to apportion harm is where the harms have occurred in ***successive incidents,*** separated by substantial periods of time.

   ★ **Example:** P, a passenger in a car, is first injured when the car collides with a truck driven negligently by D1, and owned by D2. Almost one year later, P is involved in a second accident, and certain injuries sustained in the first accident are aggravated. The trial judge instructs the jury that if they cannot apportion P's injuries between the two accidents, then the Ds are liable for all of the injuries caused to P. *Held*, if the injuries to P cannot be apportioned between the two accidents, P is out of luck, and cannot recover anything. It would not make sense to hold a tort-feasor liable "not only for the damage which he caused, but also for injuries subsequently suffered by the injured person." *Bruckman v. Pena*, 487 P.2d 566 (Colo. 1971).

   Note: But in contrast to *Bruckman*, one court has held that on facts similar to those of *Bruckman*, the jury should try to make a "rough apportionment", and if it cannot do so, should allocate the damages equally between or among the accidents. *Loui v. Oakley*, 438 P.2d 393 (Haw. 1968).

4. **Overlapping liability:** Even if the harm is apportionable among the various defendants, it may still be the case that more than one defendant is liable for all or a portion of the harm. For instance, if the defendant negligently breaks the plaintiff's leg, and a physician negligently treats the leg so that it becomes infected and has to be amputated, the original defendant will be liable for the full harm, including amputation (since he will be held to have been a proximate cause of the entire injury — see *supra*, p. 136); the physician, however, will only be liable for the worsening of the condition due to his negligence (i.e., the damage represented by having a broken leg become an amputated leg.)

C. **Indivisible harms:** Some harms, however, are not even theoreticallly divisible into portions caused by each of the defendants.

1. **Death or single injury:** If the plaintiff ***dies***, for instance, as a result of concerted or independent acts by two defendants, each will be liable for the death, because death is not apportionable. This will similarly be the case for any other kind of ***single personal injury.***

2. **Fires:** Similarly, if the plaintiff's property is ***burned*** or otherwise destroyed, this will generally be an indivisible result. Thus in *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, *supra*, p. 118, in which a fire started by the defendant merged with a fire of unknown origin, and both destroyed the plaintiff's property, the defendant was held liable for the entire result. Recall that in cases involving such "concurrent causes" (*supra*, p. 118), the defendant will generally be liable if his conduct was a "but for" cause (and a proximate cause) of the damage, or a "substantial factor" in producing the result. If the harm is indivisible, then once the defendant is liable at all, he is liable for the whole harm.

   a. **Apportionment between guilty and innocent causes:** But if apportionment is feasible, it may be made between a guilty and an innocent

cause, just as between two guilty ones. Thus in *Anderson, supra*, if it had been possible to show that half the plaintiff's property was burned by the unknown fire, and half by the fire caused by the defendant, the defendant would have had to pay only for the value of the half he burned.

i. **Potential damage as factor:** In a few situations the court may reduce the defendant's liability on account of ***potential*** diminutions in the value of the interest of the plaintiff in question.

★ **Example:** P, a 14-year-old boy, is sitting on a bridge, when he loses his balance. As he falls, he grabs onto power lines owned by D, which electrocute him. There is evidence that even had P not touched the power lines, he would almost certainly have been either killed or seriously injured. *Held*, P may recover from D only the difference between what his life prospects were worth immediately before he touched the wire, and what they were worth after. *Dillon v. Twin State Gas & Electric Co.*, 163 A. 111 (N.H. 1932).

II. SATISFACTION

A. Only one recovery: As we have seen, a plaintiff may bring an action against any or all of the potential defendants in order to secure a judgment. However, he is entitled to only one ***satisfaction*** of his claim.

★ **Example:** The Ps are injured in an automobile accident, and bring this action against several Ds, including the State of New York. The Ps recover on a judgment against New York, and some of the other Ds claim that the recovery from New York bars a recovery from them. *Held*, for Ds. Ps are entitled to collect only once for their damages. Assuming that New York and the other Ds were jointly and severally liable, payment by New York releases the others from liability to the Ps. *Bundt v. Embro*, 265 N.Y.S.2d 872 (1965).

1. **Incomplete recovery:** If the recovery from one of the joint tortfeasors does not fully satisfy the claim, the amount received by the injured party is credited to the other defendants who may be liable.

III. RELEASE

A. Significance of release: A plaintiff who has possible causes of action against two or more defendants may ***settle*** with one while pursuing his lawsuit against the remainder. Until recently, the precise manner in which he settled his claim against the one had grave consequences for his ability to pursue the others.

1. **Release:** At common law, if the plaintiff gave a ***"release"*** to one defendant (i.e., a document absolving the latter of all liability), this was held to ***release the other defendants as well.*** This rule was the product of the common law fiction that a plaintiff had only one, indivisible, cause of action against all the joint tortfeasors, and it could not be extinguished as to one yet alive as to the others.

a. **Covenant not to sue:** But if the settlement was embodied by a ***"covenant not to sue"*** (i.e., a contract in which the plaintiff promised not to sue, and would be liable in damages if he did) other defendants were not absolved of liability. Thus careful lawyers used the covenant not to sue rather than the release whenever there was any possibility of continuing the action against some other defendant.

2. **Modern view:** Only two states, Washington and Virginia, still apply the common law rule that a release of one defendant relieves all others, even if the release explicitly provides otherwise. Most states, either by statute or case law, hold that this will still happen where the release is ***silent*** on the question of continuing liability of other defendants.

★ **Example:** P is injured in a fall on D's property. X, a tenant of D, pays P $2,500 in consideration of P's execution of a "Covenant Not to Proceed with Suit," which document reserves P's right to sue other joint tortfeasors. D claims that the common law rule should be applied. *Held*, for P. Had P not expressly reserved his right to bring an action against the other joint tortfeasors, the common law rule would be applicable. However, where the release "expressly reserves the right to sue others who may be liable, it should not in law be treated otherwise." P's reservation of her right to sue indictes that she is not receiving full compensation from X for her injuries. *Cox v. Pearl Investment Co.*, 450 P.2d 60 (Colo. 1969).

3. **Restatement view:** The Second Restatement, in §885, goes even further, and provides that non-settling defendants will never be absolved of liability by a release unless the document ***explicitly states*** that they will be. Otherwise, the Restatement says, the release is a "booby trap for the unwary, since many releases are signed or even drawn without legal advice", and fail to reserve the releasor's rights against non-settling defendants even where it is intended that these rights remain.

IV. CONTRIBUTION

A. Contribution generally: Suppose that the case is one in which several defendants are theoretically jointly and severally liable (because each was a proximate cause of the plaintiff's indivisible harm). As we have seen, this means that the plaintiff may obtain a judgment against any one of the defenants, and collect the full amount from him. If this happens, does that defendant get stuck with the entire loss? Or may he instead turn to the other defendants and obtain at least a share from them?

1. **Sometimes available:** The answer is that the defendant who has paid more than his *pro rata* share may often obtain partial reimbursement from the other defendants; when he does so, he is said to have received ***contribution***.

B. Historically limited: It has always been virtually universally held, both in England and America, that a ***willful or intentional*** tortfeasor has no right to contribution from his fellow wrongdoers. For a variety of historical reasons, this rule was extended during the latter part of the nineteenth century, to prevent contribution on behalf of

any tortfeasor, even if he was merely "ordinarily" negligent.

1. **Changed by statute:** However, in recent years, more than half the states have enacted statutes permitting contribution among tortfeasors in various situations. These statutes are frequently patterned on the Uniform Contribution Among Tortfeasors Act. Another 9 states or so have judicially accepted contribution in at least some circumstances. Prosser, p. 306-7.

   ★ **Example:** The Ps, guests in a car owned and operated by D, are injured when D's car collides with a taxicab, owned by X, and operated by Y, X's employee. The Ps sue X but not D. The jury finds that the accident was caused by the negligence of both D and Y, and awards damages against X on a theory of vicarious liability (see *infra*, p. 238). X, who has brought D into the suit as a third-party defendant, is given the right to collect from D half of the damages, if he pays the Ps the full amount of the judgment.

   Held, on appeal, the grant of the right of contribution to X from D was proper. It is irrelevant that there was no judgment obtained by the Ps against D. The common-law rule disallowing contribution between non-intentional tortfeasors is hereby overruled. Otherwise, the plaintiff and one defendant could gang up on another defendant, and force him to pay for the plaintiff's entire damages. *Knell v. Feltman*, 174 F.2d 662 (D.D.C. 1949).

2. **Amount of contribution:** To the extent that contribution has been allowed in the absence of statute, the historical tendency has been to require each defendant to pay an ***equal share.*** See Prosser, p. 310.

   a. **Comparative negligence:** But states adopting ***comparative negligence*** (see *infra*, p. 214), as many have recently done, have often taken the similar step of making the duty of contribution proportional to fault. For instance, in New York, any joint tort defendant may request that the jury allocate fault among the various defendants. This does not change the fact that the plaintiff, if he obtains a verdict, may collect the entire amount against any defendant (assuming that the requirements for joint and several liability are met). But it does mean that if the jury assigns one-third of the fault to one defendant and two-thirds to another, and the one-third defendant pays the entire judgment, he may collect two-thirds of that amount from the other defendant.

      i. ***Dole v. Dow Chemical:*** This result was originally reached by the New York Court of Appeals in the case of *Dole v. Dow Chemical Co.*, 282 N.E.2d 288 (1972), which involved indemnity rather than contribution; it was then embodied in a revised New York contribution statute.

C. **Present limitations:** Use of the contribution doctrine is still limited, however, in certain important respects, even in those states which allow it.

1. **No intentional torts:** Thus it is still the case that an ***intentional*** tortfeasor may not have contribution from his co-tortfeasors. Some courts also refuse to allow it in cases of "aggravated" or "gross" negligence. Prosser, p. 308.

2. **Contribution defendant must have liability:** The contribution defendant (i.e.,

the co-tortfeasor who is being sued for contribution) must in fact be ***liable*** to the original plaintiff. If he has a defense that would bar his liability to the plaintiff, the other defendant may not have contribution against him even if the two acted in concert. And the contribution plaintiff bears the burden of proving in the contribution suit that the defendant would have this liability to the plaintiff.

★ **Example:** Wife is a passenger in a car driven by Husband. The car collides with a taxi driven by an employee of D Cab Co. Wife sues D for her injuries, and D cross-claims against Husband, alleging that he drove negligently. The jury's verdict indicates that both D and Husband were negligent, and judgment is entered against D on behalf of Wife. D then seeks contribution from Husband for half of the judgment against Wife. *Held*, intra-family immunity(*infra*, p. 227) prevents Husband from being liable to Wife for his torts against her. Since Husband had no theoretical liability, he is not a joint tortfeasor with D, and D cannot obtain contribution from him. *Yellow Cab Co. of D.C., Inc. v. Dreslin,* 181 F.2d 626 (D.C. Cir. 1950).

a. **Minority Rule:** Most courts would concur in the result reached in *Yellow Cab*. A few courts, however, have allowed contribution against a potential co-defendant who has intra-family immunity from suit by the plaintiff; these cases have relied on the theory that intra-family immunity does not bar the existence of tort liability, but merely the capacity to bring suit. See P,W&S, p. 387.

3. **Other barriers to suit:** Most courts also bar a contribution suit against the employer of a plaintiff employee where a ***Workman's Compensation*** statute prevented the plaintiff from suing the employer in tort. (See *infra*, p. 223) Similarly, where the plaintiff was an injured automobile passenger, who recovers against the driver of the other car involved in a collision, it is usually held that that driver cannot recover against the driver of the passenger's car, where the passenger would have been barred from suit by an ***automobile guest statute.*** However, the major purpose of such guest statutes is to prevent collusion between passenger and driver, and this objective would not be weakened by permitting a contribution suit by the other driver. See P,W&S, p. 387-8.

D. Settlements: The most controversial issues in the law of contribution have involved ***settlements.*** There are two distinct issues: First, may a defendant who has settled with the plaintiff recover contribution from other potential defendants? Second, may a defendant who has settled be sued later by other defendants against whom a judgment is recovered?

1. **Settlement by contribution plaintiff:** Where there is no statutory provision on point, it is almost always held that a defendant who settles may turn around and ***obtain contribution*** from other potential defendants. However, he bears the burden of proving not only that he and these other defendants were actually liable, but also that the ***settlement amount was reasonable.*** Prosser, p. 308-9.

a. **Restrictive statutes:** Several state statutes, however, allow only those defendants against whom a judgment has been rendered to obtain contribution from potential co-defendants. (*Ibid*).

2. **Settlement by contribution defendant:** The most controversial question of all is whether a defendant who has settled can later on be sued for contribution by another defendant against whom a judgment has been obtained by the plaintiff.

   a. **Traditional Rule:** The traditional, majority, rule has been that the settling defendant ***can*** be later held liable for contribution. This is not a very good rule, however, since it greatly discourages any defendant from settling — he cannot settle and close the file, since he knows he may have contribution liability later on; therefore, he has no incentive to settle.

   b. **"Reduction of plaintiff's claim" rule:** Some courts have tried to prevent this problem by imposing a rule that does not allow contribution, but that ***reduces*** the plaintiff's claim against the subsequent defendant pro-rata (thus having the same result as contribution as far as the second defendant is concerned.)

      Example: P is injured when her car collides with a truck belonging to D, and a car driven by X. P gives X a release for nominal consideration, because she thinks X will lose his license if he pays her anything or is held liable. P then sues D, who impleads X as a third party defendant. A jury finds that P's damages are $26,500, and awards her this sum against D. *Held,* by settling with X, P liquidated one-half of her total right to recover. Therefore, she may recover only the remaining one-half of her damages, or $13,250, against D. D, of course, is then not allowed to obtain contribution from X. *Palestine Contractors, Inc v. Perkins*, 386 S.W.2d 764 (Tex. 1968).

   c. **"No contribution" rule:** The rule applied in *Palestine* is obviously extremely harsh on the plaintiff, particularly an ignorant Good Samaritan like the one there. Furthermore, it discourages the knowledgeable plaintiff from settling almost as much as the full contribution rule discourages a defendant from doing so. Therefore, some courts now ***discharge*** the settling defendant from contribution liability completely.

      i. **Uniform Act:** This is the position of the most recent (1955) version of the Uniform Contribution Among Tortfeasors Act, §4. The settlement must, however, have been reached by both parties "in good faith" (i.e. not in collusion so as to thrust liability onto the other defendant.)

      ii. **Second Restatement position:** §886A of the Second Restatement has a caveat taking no position on this question, but the Reporter's Comments indicate a preference for this latter solution. Observe, however, that this solution will often lead to inequitable liability distribution among the defendants, based on the fortuity of who happens to settle first.

V. INDEMNITY

A. Concept of indemnity generally: Contribution is, as we have seen, a sharing of payment for joint liability. There are situations, however, in which, either out of a

general sense of fairness, or because of a great difference in the degree of culpability of the two defendants, the court will ***shift*** the financial responsibility for the tort from one defendant to the other. This is done by the doctrine of ***indemnity***; when the one tortfeasor pays some or all of the plaintiff's damages, he is indemnified by the other tortfeasor for ***everything*** that he paid. Thus indemnity is a 100% shifting of liability, whereas contribution is a sharing.

1. **Restatement's explanation:** The Second Restatement, §886B(1), expresses the rationale for indemnity by saying that there shall be a shifting when one tortfeasor has paid the claim (discharging both), and the other would be ***"unjustly enriched"*** if he were not required to fully reimburse the first.

B. No general rule: It is impossible to state a general rule about when indemnity will be permitted. However, some of the more common situations in which it will be allowed are as follows:

1. **Vicarious liability:** If one defendant is only ***vicariously liable*** for the other's conduct, the former will be indemnified. For instance, an employer is generally liable for the torts of his employee (*infra*, p. 238), and an employer who had to pay for such a tort could recover the full amount of the payment from the employee. See Rest. 2d, §886B(2)(a).

2. **Supplier of goods:** If a manufacturer produces defective goods, he will have a duty to indemnify a ***retailer*** who resells them and incurs liability (assuming that the retailer negligently or innocently failed to discover the defect, but not if the retailer knew about the defect.) The manufacturer would similarly be liable to an ultimate user who incurs liability due to an innocent or negligent failure to discover the defect (e.g., the driver of a defective car who injures a pedestrian.)

3. **Dangerous condition upon land:** By the same theory, a ***contractor*** who negligently constructs or repairs a building will have to indemnify an owner who negligently or innocently fails to discover the defect, if the latter is liable to a tenant, guest, etc., who injures himself.

4. **Contract:** Or, a ***contract*** between the two tortfeasors may provide that one will indemnify the other. This is a frequent provision, for instance, in building contracts between a general contractor and sub-contractor.

C. Questionable areas: In addition to these well-defined circumstances in which indemnity will be allowed, there are a few areas in which courts have differed, or in which the basis of indemnity is not clear.

1. **Gross negligence or intentional misconduct:** A few cases have allowed a tortfeasor who was merely "ordinarily" negligent indemnity against one whose wrongdoing was intentional or "reckless and wanton". See, e.g., *Heit v. Bixby*, 276 F.Supp. 217 (E.D.Mo. 1967) (holding that corporate directors who were liable for ordinary negligence could be indemnified by directors who committed intentional misconduct.) But most courts have rejected the general principle that one guilty of gross misconduct must indemnify an ordinary wrongdoer.

★ **Example:** P, D1's brother, is a passenger in D1's car, when that car is

involved a collision with D2. P sues D2, and D2 brings a third party complaint against D1, asking for indemnity against D1 in the event he is held liable to P. D1 moves to dismss the third party indemnity claim prior to trial. *Held*, the third party claim for indemnity must be dismissed since there can be no indemnity based merely on the allegation that D1 was grossly negligent and D2 ordinarily negligent. To allow such an indemnity claim would extend the already questionable distinction between gross and ordinary negligence, and would prolong litigation. *Panasuk v. Seaton*, 277 F. Supp. 979 (D.Mont. 1968).

a. **"Comparable culpability":** But a recent case, recounted in the following example, may indicate a new trend to decide indemnity questions on the general basis of "comparative culpability", instead of the use of more formal, traditional bases such as degrees of negligence.

Example: D1 drives a school bus. During the ride one day, D2 and D3, students who are engaging in horseplay, injure the eye of P, a fellow student. A jury finds that D2 and D3 were negligent, and also finds that D1 failed to carry out his duty of supervision. The jury is instructed to apportion negligence among the defendants, and finds D1 76% negligent, and D2 and D3 each 12% negligent. *Held*, on appeal, D2 and D3 were primarily negligent, and D1 was only secondarily negligent. Therefore, it was inappropriate to have the jury apportion negligence among them. Instead, each will be jointly and severally liable. However, D1 has a right to indemnity from D2 and D3; this is so because indemnity is to be determined by looking to the "relative culpability of the conduct of the wrongdoers". (But the court also relied on an earlier case stating that indemnity would not be required where the tortfeasors merely had different degrees of negligence, but only where there was a "difference in the character or kind of wrongs".) *Hillman v. Wallin*, 215 N.W.2d 810 (Minn. 1974).

2. **Partial Indemnity:** Traditionally, indemnity was an "all or nothing " affair — either the indemnitor paid the indemnitee the full amount that the indemnitee had paid the plaintiff, or he paid him nothing. However, as part of the rise of comparative negligence, some courts and statutes are now allowing indemnity for ***less than the full amount*** paid by the indemnitee. Thus in *Dole v. Dow Chemical Co.*, 282 N.E.2d 288 (N.Y. 1972), the New York Court of Appeals held that the amount of indemnity would depend on the relative fault of the two tortfeasors. (But the *Dole* case does not apply where the indemnitee's original liability was merely vicarious; in this situation, the indemnitor must pay the full amount to the indemnitee, and there is no question of relative degrees of negligence.)

3. **Subsequent injuries:** Indemnity has also sometimes been allowed in favor of a tortfeasor who has been held liable not only for his own acts but also for ***later consequences*** caused by the negligence of others. For instance, one who injures the plaintiff in a car accident, and who pays not only for these initial injuries but also for later injuries to the plaintiff resulting from a physician's malpractice in

treating the injuries, might be entitled to indemnity from the negligent physician with respect to that portion of the payment representing the additional malpractice consequences. Rest. 2d, §886B, Comment j.

DUTY

I. "DUTY" GENERALLY

A. Introduction: In the list of elements of a negligence cause of action given on p. 75, *supra,* one requirement was that the defendant owe the plaintiff a ***"duty of care"***. In most tort cases, this duty is simply the duty of behaving towards the plaintiff with the degree of care that a reasonable man would exercise in like circumstances. (See, e.g., *Heaven v. Pender*, 11 Q.B.D. 503 (1883).) In such cases, the courts devote relatively little attention to this general requirement of duty, since it is so uniform; instead, they spend most of their energies looking at whether the defendant's conduct met this duty.

1. **Special cases:** There are several classes of cases, however, where the courts have held that the defendant owes the plaintiff something less than or more than the exercise of the degree of care a reasonable man would use. Sometimes, courts have held that the defendant owes the plaintiff no duty at all. For instance, we saw in *Palsgraf, supra*, p. 124,that, under the theory of that case, the defendant owed no duty at all to a plaintiff who was outside the scope of risk imposed by the defendant's negligence. And we have alluded several times to the rules governing common carriers, which hold them to a higher standard of care (the obligation to use extreme care) towards their passengers.

2. **Scope of this chapter:** This chapter considers several kinds of cases in which, because of either the nature of the plaintiff (e.g. an unborn child), the type of harm suffered (e.g., pure mental suffering, with no physical effects) or the plaintiff's relation to an occurrence (e.g. mere bystander), the defendant is held to have violated no duty to the plaintiff.

   a. **Conclusory Term:** As will be quickly seen in these cases, courts use the concept of "duty" in a highly conclusory manner. That is, because they wish to avoid allowing recovery, they state that the defendant owed no duty to the plaintiff to avoid the harm in question. The concept of duty is thus similar to that of proximate cause, and many of the cases discussed in this chapater could have been treated in the previous one. For instance, in a case raising the question whether the plaintiff may recover for emotional suffering not accompanied by physical symptoms (to which the answer is almost always "no"), the case may be decided on the basis of whether the defendant owes the plaintiff a duty to avoid this kind of harm (the approach followed here) or, by contrast, on the basis of whether emotional harm unaccompanied by physical harm can ever be so foreseeable and closely related to the defendant's conduct that the latter should be held to be the proximate cause of the former.

b. Other examples: Other situations in which the usual standard of duty is modified are considered in other chapters. The most important of these involves ***owners and occupiers of land,*** treated in a separate chapter beginning *infra,* p. 171. ***Vicarious liability*** of employers, car owners, etc. may also be seen as a modification of the general duty of care; such liability is discussed *infra*, p. 238.

II. FAILURE TO ACT

A. No general duty to act: Can a person be liable in tort solely on the grounds that he has ***failed to act?*** The general answer to this question given by the common law, an answer which continues today, is ***"no".***

1. **Misfeasance v. nonfeasance:** Thus the law distinguishes sharply between ***misfeasance*** (i.e., an affirmative act which harms or endangers the plaintiff) and ***nonfeasance*** (a mere passive failure to take action). All the cases we have seen thus far involved defendant's conduct of the former category. Many of the cases refusing liability for nonfeasance which we will examine here are generally considered absolutely scandalous by commentators, and are a unique product of Anglo-American law with almost no counterpart in other Western countries.

2. **Duty to protect or give aid:** Most nonfeasance cases arise when the defendant sees that the plaintiff is in danger, and ***fails to render assistance,*** even though he could do so easily and safely. As stated, the rule is that unless there is some ***special relationship*** between the defendant and the plaintiff, the former is ***not liable for his refusal to assist.*** See Rest. 2d, §314.

   ★ **Example:** P is a passenger on a plane that is about to land at an airport operated by D City. Instead, the plane lands in a lake next to the airport; P escapes and holds onto the wing of the plane, but then drowns when the plane sinks. His estate alleges that D's employees who ran the airport had a duty to rescue him, and negligently delayed in doing so. *Held*, the airport was in no way responsible for P's predicament (as it might have been had the accident been due to erroneous flight controller information); therefore, the city was, in effect, "a mere bystander" owing no duty to rescue P, no matter how easily and safely this might have been done. The fact that this kind of accident was foreseeable, and that in fact D had conducted rescues in the past in similar situations, is irrelevant, since this is not enough to constitute an "assumption of duties" (discussed *infra*, p. 157.) *Bishop v. City of Chicago,* 257 N.E.2d 152 (Ill. App. 1970).

   a. **Appalling Results:** The doctrine that a mere bystander has no duty to lift a finger in rescue, was carried to a particularly appalling extent by one case, in which D induced his friend, P, to jump into a trench containing water eight to ten feet deep, and P drowned. D was held not liable for his failure to attempt rescue. *Yania v. Bigan, 155 A.2d 343 (Pa. 1959).*

B. Exceptions: Courts have, however, carved out an increasing number of ***exceptions*** to this general rule. These have generally involved situations where a plaintiff and a defendant had some ***special relationship*** to each other, or the defendant was somehow connected with the plaintiff's predicament.

1. **Business relationship:** It has always been the case that certain callings imposed a duty to furnish assistance to patrons. This has been true of ***common carriers*** with respect to their passengers and ***innkeepers*** with respect to their guests. In recent years most courts have extended this rule to require that anyone who maintains ***business premises*** must furnish warning and assistance to a

business visitor, regardless of the sourse of the danger or harm. See Rest. 2d, §314A.

★ **Example:** P, 6 years old, is shopping with his mother in the D Department Store. Through no negligence of D, P's fingers get caught in the escalator. D unreasonably delays stopping the escalator, thereby aggravating P's injuries. *Held*, for P. The operator of a store has a duty to come to the aid of an invitee who is using an instrumentality provided by, and under the control of, the operator. However, since D did not originally operate the escalator in a negligent manner, it is not liable for P's initial injuries, but only for the aggravation of them which resulted from not stopping the escalator with reasonable promptness. *R.S. Ayres and Co. v. Hicks*, 41 N.E.2d 195 (Ind. 1942).

a. Employer: Similarly, it has been established for a long time that an ***employer*** must give warning and assistance to an employee who is endangered or injured during the course of his employment. See, e.g., *Szabo v. Pennsylvania R.R.*, 40 A.2d 562 (App. Ct. N.J. 1945).

b. University-student relationship: But it has been held that there is no special relationship between a university and a student, whereby the school is bound to use due care to regulate the private affairs of its students.

★ **Example:** P, age 17, is enrolled at D University. She associates with criminals, becomes a drug user, engages in sex, and absents herself from the dormitory. D takes no action to regulate P's activities, and fails to return her to her parents upon their request. *Held*, for D. A university is not required by law "to regulate the private lives of [its] students, to control their comings and goings, and to supervise their associations." Students who choose to attend D University are presumed to be sufficiently mature so as to conduct their personal affairs in a responsible manner. *Hegel v. Langsam*, 273 N.E.2d 351 (Ohio Ct. Com. Pl. 1971).

2. Defendant involved in injury: A second major exception is that the defendant will have a duty of warning and assistance if the danger or injury is ***due to his own conduct,*** or to an instrument under his control. See Rest. 2d §314, Comment D.

a. Negligence: Originally, this rule applied only where the original danger or injury was the result of the defendant's negligence or other fault. Thus in one case the defendant sold bad fish to a dealer, who resold the fish to the plaintiff, and the defendant then delayed passing on to the dealer its discovery of the danger, leading to plainfiff's death. In finding liability for failure to warn, the court relied on the fact that defendant had violated its statutory duty not to sell adulterated food. *Ward v. Morehead City Sea Food Co.*, 87 S.E. 958 (N.C. 1916).

a. Innocent danger from defendant: Where the danger or harm arose from the defendant's ***innocent*** actions, it was not until fairly recently that courts began to impose a duty of warning or rescue. Thus, one court held that the

defendant railroad was not liable where its employees non-negligently ran a locomotive over the plaintiff; they had no duty to try to prevent him from bleeding to death! *Union Pacific Ry. v. Cappier,* 72 P.281 (Kan. 1903).

i. **Modern View:** The modern, and certainly more conscionable, view is that if the defendant endangers or harms the plaintiff, ***even if he does so completely innocently,*** he must render assistance or warning when he discovers the problem. See Rest. 2d, §§ 321-2.

ii. **Hit and run:** A number of ***"hit and run"*** driving statutes in various states require a driver to render assistance to one whom he has hit (even if non-negligently); these have sometimes been held to result in negligence per se, and civil liability, where the driver does not do so. See Prosser, p. 343.

3. **Assumption of Duty:** An additional limitation on the lack of duty to render assistance is that once the defendant ***voluntarily begins*** to render such assistance (even if he was under no legal obligation to do so) he must ***proceed with reasonable care.*** This means that he must not unreasonably aggravate the plaintiff's condition, or abandon the plaintiff after the latter has forsaken other avenues of assistance.

★ **Example:** P becomes sick in the D department store. D's employees attempt to give aid to P, by putting her in the store infirmary. However, they leave her there for six hours, without medical care, and she dies. *Held,* it may be that D owed P no duty of assistance in the first place. But once having undertaken to give such assistance, D had a duty to use due care in doing so. *Zelenko v. Gimbel Bros.,* 287 N.Y.S. 134 (N.Y.Sup.Ct. 1935).

a. **Preventing assistance by others:** In finding that one who has undertaken to give aid must carry through with reasonable care, the courts have often relied on the fact that a voluntary giving of such assistance ***prevents others*** (who might do a better job) from giving aid. Thus in *Zelenko, supra,* the court noted that if D had left P alone, "beyond doubt some bystander, who would be influenced more by charity than by legalistic duty, would have summoned an ambulance. Defendant segregated [her] where such aid could not be given and then left her alone."

i. **Other factors:** However, the prevention of aid by others is only one way in which a defendant who voluntarily undertakes to give assistance may become liable. Even where there is no possibility of assistance by third persons, if the defendant behaves carelessly, and the plaintiff's condition is worsened as a result, there will be liability.

b. **Pre-employment physical exam:** The "assumption of duty" rationale has also been used to impose liability on an employer who gives a job applicant a ***pre-employment physical exam.***

★ **Example:** P has an undiscovered, progressive, disease, which is discoverable by routine blood tests. As a condition to P's employment as a test pilot by D, a pre-employment physical examination is performed by D's

doctors. Though a blood sample is taken, the doctors never review the report, but merely file it away. P is hired, but without treatment, his disease grows progressively worse. *Held*, for P. While an employer usually does not owe a duty to a prospective employee to see whether he is physically fit for the job, once the employer assumes the duty to examine the applicant, he is liable if the examination is performed negligently. *Coffee v. McDonnell-Douglas Corp.*, 503 P.2d 1366 (Cal. 1972).

4. **What constitutes undertaking:** Because of this exception (which arises out of the old common law distinction between misfeasance and nonfeasance), it becomes important to note when the defendant has actually undertaken to give assistance. In general, very little in the way of affirmative action has been necessary to trigger this action.

   a. **Past custom:** A ***past custom*** of giving warning or assistance has been held to constitute an undertaking, at least where the plaintiff is aware of the custom. Thus in *Erie R. Co. v. Stewart,* 40 F.2d 855 (6 Cir. 1930), the defendant railroad maintained a watchman at a crossing, who customarily warned motorists when there was a train approaching. The plaintiff, who was aware of this custom, saw no sign from the watchman, crossed, and was crushed by the oncoming train; the watchman had been otherwise occupied. The defendant was held liable on the grounds that the plaintiff relied on the absence of a warning.

   b. **Promise to assist:** Until recently, it was almost always held that a mere ***promise*** to give assistance, unaccompanied by any overt act, was ***insufficieint.*** Thus in the famous case of *Thorne v. Deas,* 4 Johns. 84 (N.Y. 1809), P and D were co-owners of a ship which was about to go on a long voyage. D promised on two occasions to procure insurance on the ship, and P therefore refrained from doing so. The ship was lost at sea; it turned out that D had never obtained the insurance, and D was held not liable — P had no action in contract, because of lack of consideration, and no action in tort, because of the lack of an undertaking (i.e., this was nonfeasance, not misfeasance). See P,W&S p. 437.

      i. **Small action sufficient:** However, in order to avoid the harshness of the result in cases like *Thorne v. Deas*, courts have often strained to find an affirmative undertaking in the most trivial overt acts. Thus, in *O'Neill v. Montefiore Hospital*, 202 N.Y.S.2d 436 (N.Y.1960), a sick man went to the defendant's hospital, where he was refused treatment, but told to come back to see another doctor later that evening. The sickness turned out to be a heart attack, he died before he could come back, and the advice to come back was held to be an undertaking to give medical help.

      ii. **Reliance on promise alone:** Modern law, both contract and tort law, has begun to show a willingness to allow recovery based solely upon a promise to provide assistance, even if no overt act of performance ever occurs. In contract law, this has been done under the doctrine of

"promissory estoppel"; see Restatement Second of Contracts, §90. In tort law, a few courts have simply dispensed with the requirement of an overt act by the defendant, where the plaintiff has relied, to his detriment, on the defendant's unperformed promise of assistance.

★ **Example:** P, shopping in D's store, is bitten by D's cat. P asks D to lock the cat up for fourteen days, so that he can be tested for rabies. D promises to do so, but carelessly lets the cat out whereupon it disappears for a month. D is therefore advised by her doctor to undergo a painful and dangerous series of rabies shots. After she completes the treatment, and suffers side effects from it, the cat comes back in perfect health. *Held,* D, by his promise to confine the cat, undertook to do so, and therefore had a duty to use at least reasonable care in seeing that this was done. P obviously relied on D's promise, since otherwise, she could have had local health authorities lock up the cat and test it. *Marsalis v. La Salle,* 90 S.2d 120 (La. 1957).

iii. **Restatement view:** The Second Restatement states, in a Caveat to §323, that it expresses no opinion about whether a mere promise can be an undertaking. Prosser, however, believes that cases like *Marsalis* "may possibly represent the beginning of the overthrow of the traditional view" that a promise is not enough to constitute an undertaking. Prosser, p. 346. For a recent case in which it was explicitly held that a promise was sufficient in itself, see *Brown v. MacPherson's Inc.,* 545 P.2d 13 (Wash. 1975) (defendant's promise to warn plaintiff of danger of avalanche held to have prevented third party from giving similiar warning.)

5. **Duty to control others:** Nonfeasance may also be tortious where the defendant has undertaken to control ***third persons*** who then injure the plaintiff. Such a duty may arise either because of a special relationship between the ***defendant and plaintiff,*** or a special relationship between the ***defendant and the third person.***

a. **Defendant-plaintiff relationship:** Such special defendant-plaintiff relationships include ***common carrier-passenger*** (with a duty on the carrier to use reasonable care to protect its passengers from attacks or robberies by strangers); ***innkeeper-guest*** (e.g., the Connie Francis case, where Howard Johnson was held liable for inadequate room security leading to a rape of the singer); ***hospital-patient***, ***school-pupil***, and ***parent-child***. See Prosser, p. 349. A number of cases have even held that ***any business*** open to the public must protect its patrons from such third party misconduct. (*Ibid*).

★ **Example:** X, 18 years old, lives with his parents, the Ds. The Ds allow X to roam freely around young children, despite the fact that they know, or should know, that their son is a vicious person with a habit of assaulting smaller children. P, a child, is injured by X.

Held, for P. Since the Ds had notice of X's particular tendencies, and could have controlled his actions, they " . . . owed a duty to society to guard their son closely to see to it that he did not indulge in his vicious

propensities." *Linder v. Bidner*, 270 N.Y.S.2d 427 (N.Y. Supr. Ct., Queens Co. 1966).

Note: According to the *Linder* court, while parents have a duty to prevent a definite, known, type of harmful conduct by their children, there is no liability for the "general incorrigibility" of their children.

b. Defendant-third party relationship: Alternatively, the relationship between the defendant and the third party may be such that the defendant has a duty to control that party and prevent him from harming the plaintiff. This can be so even if the defendant and the plaintiff have no relationship at all.

★ **Example:** In *Tarasoff v. Regents of University of California*, 529 P.2d 553 (Cal. 1974), *supra*, p. 88, the defendant psychotherapists had a doctor-patient relationship with Poddar, who told them of his intent to kill P. *Held*, because of this special relationship betwen Ds and Poddar, Ds had a duty to warn P of Poddar's intentions (intentions which Poddar later carried out) if a reasonable man would have done so. (Ds did not, however, have a duty to P to confine Poddar, because of a state statute granting doctors immunity with respect to this kind of decision.)

i. Other applications: Similarly, the ***owner of a car*** owes pedestrians and other drivers the duty of using reasonable care to see that one who drives the car in his presence does not do so negligently. See Rest. 2d, §318. Likewise, a ***surgeon*** in charge of an operation is responsible for preventing negligence on the part of his assistants.

ii. Only reasonable care required: But the defendant is required only to use ***reasonable care*** to prevent the misconduct of others in this kind of a situation. Thus if he does not know of the danger, he will not be liable (in the absence of some other principle, such as employer liability, *infra*, p. 238, where the liability is essentially without regard to the employer's fault.)

6. Vermont statute: These ever-broadening exceptions to the rule that no liability for pure misfeasance will exist may mean that the rule itself will some day be rejected in America, as it is in other Western countries. A further indication of this possibility is a statute enacted by Vermont in 1973, entitled the "Duty to Aid the Endangered Act." It provides that a "person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself, or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance is being provided by others." Violations are punishable by fine of not more than $100, and one who provides such assistance is not civilly liable unless he is grossly negligent or expects to receive renumeration. See P,W&S, p. 426, fn. 4.

7. Good Samaritan protection for physicians: Because of the nonfeasance/misfeasance distinction, a ***physician*** who refuses to give

emergency aid will never have any liability, whereas one who gives aid leaves himself open to a malpractice charge (made all the more likely because of the usual lack of equipment, nurses, etc. in the typical on-the-street emergency). For this reason, more than forty states have passed so called ***"Good Samaritan"*** statutes, which generally relieve a physician who gives assistance at the scene of an emergency (but not in a hospital) from all liability, or from all liability except for gross negligence. See, e.g., §2144 California Business and Professions Code.

III. EFFECT OF A CONTRACT

A. Relation between tort and contract: The borderline between tort law and contract law is not always clear-cut. For instance, P buys a car from D, a dealer. If the car is defective, and injures both P and a bystander, X, are the suits brought by P and X to be in tort or contract? It is not unreasonable for the actions to be in tort, since D may have violated its duty to the world at large not to sell defective products that may foreseeably cause personal injury. On the other hand, especially with respect to the suit by P, the fact that there is a contract between P and D should certainly have some relevance.

1. **Practical significance of distinction:** The choice between contrct law and tort law is not academic. For instance, the Statute of Limitations may have run on a tort action, but not yet on a contract action (which is usually given a longer period). Conversely, the damages available to one suing in tort are likely to be much broader than for one suing on a contract. (In the latter case, they are limited by the rule of *Hadley v. Baxendale*; see Emanuel on *Contracts*).

B. Traditional distinction between misfeasance and nonfeasance: The common law has traditionally been much more willing to find that, where a contract exists, there has been a tort if the defendant was guilty of ***"misfeasance"*** rather than merely ***"nonfeasance"***. (The significance of this distinction is also discussed *supra*, p. 155, in connection with a general failure to act by the defendant). Accordingly, our discussion of the effect of a contract focuses on this distinction, first in the case of a suit brought by one party to the contract against the other, and then in the case of a suit brought by a third person, not party to the contract.

C. Party to the contract; nonfeasance: If suit is brought by a party to the contract, and his claim is that the defendant has simply ***failed to perform a promise***, the plaintiff's suit is unlikely to be found to be a tort claim. For instance, suppose that D contracts to sell P a car, and fails to deliver; because of this failure, P has to walk to his destination, and is run over while he does so. P's suit, since it alleges complete nonperformance by D, will be held to be in contract, not tort.

1. **Exception for utilities:** The only major exception to this rule is that if the defendant is a ***common carrier***, or other public utility, it may be held to have acted tortiously if it fails to honor a contract with a member of the public. Thus if A bought a ticket to ride on the B bus line, and the driver refused to let him board, this might be a tortious act.

2. **Misrepresentation:** Also, if the plaintiff can show that the defendant, when he made the promise, had ***no intent to perform it***, he may be able to maintain the tort action of misrepresentation, or deceit (*infra*, p. 308).

D. Party to the contract; misfeasance: Once the defendant ***starts to perform*** his promise, if he fails to complete it, the plaintiff has a much better chance of being able to sue in tort. Consider the common case of a physician, for instance, who is engaged to perform a particular operation. If he performs the operation, but does so negligently, he will be liable in tort (see *supra*, p. 89), notwithstanding that his negligence arose out of a contractual relation between him and the plaintiff.

1. **Election:** Thus the plaintiff may have the ability to sue either in contract or tort. In the case of a physician's malpractice, for instance, the plaintiff might, instead of suing for the tort action of malpractice, want to sue for breach of contract (although this would seldom be of practical advantage to him.) In many situations, this choice is left completely to the plaintiff, and he simply ***"elects"*** which remedy he wishes to pursue, and may even be able to pursue both at once.

   a. **Gravamen:** But some courts look for the ***"gravamen"***, or gist, underlying the plaintiff's claim, and make their own decision about which one of the two theories of recovery, tort or contract, is involved. In a court favoring this approach, for instance, a lawyer's negligent preparation of a will is likely to be considered a breach of contract, whereas a physician's negligent performance of an operation is likely to be considered the tort of negligence. See Prosser, p. 621.

E. Non-party to contract; nonfeasance: Where the plaintiff is one who is not a party to the original contract, and the defendant is guilty only of nonfeasance, the plaintiff generally cannot sue either in tort or contract. He cannot sue in contract unless he is able to show that he is a third party beneficiary (see Emanuel on *Contracts*). As for tort liability, insofar as the courts will seldom allow even a party to the contract to sue in tort where there has been nonfeasance, they have been even more reluctant to allow a non-party to sue in tort.

★ **Example:** D, a water company, contracts with the city of Rensselaer to supply water to the city, for use in public buildings, fire hydrants, etc. The contract also indicates that service will be furnished to private parties who pay fixed rates. One day a fire starts, and spreads until it has destroyed a warehouse belonging to P. P sues on the theory that D failed to supply adequate water pressure, which would have enabled the fire department to stop the fire before it burned his warehouse. The suit is brought in tort. *Held*, P has no tort cause of action against D. D's action in this case amounted merely to nonfeasance, not affirmative misfeasance. If P were granted a right of action, then "liability would be unduly and indeed indefinitely extended by this enlargment of the zone of duty. . . . Every one making a promise having the quality of a contract will be under a duty to the promisee by virtue of that promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun." *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).

Note: Cases such as *H.R. Moch* have been almost universally criticized by commentators, but they still represent the majority position, that a water company is not liable to private citizens. As Prosser notes (p. 626), D in fact began to perform the contract (it supplied water to most of the city), so it was guilty of misfeasance, not merely nonfeasance. Furthermore, by making the contract with the city, it induced the city and its citizens to forego other opportunities for obtaining an adequate supply of water, and they therefore relied to their detriment (a factor considered in the duty cases discussed *supra*, p. 157).

F. Non-party to the contract; misfeasance: Where the third-party sues on a theory of misfeasance, rather than nonfeasance, his chance of recovery in tort is substantially better. Nonetheless, courts have historically been reluctant to allow recovery, on the misguided notion that tort recovery is barred because there is no "privity of contract".

★ **Example:** D contracts with a post office to keep a mail coach in good condition. D fails to do so, and P, the driver of the coach, is injured when the coach breaks down. *Held*, for D. D's obligation of repair arose from a contract. Any claim for non-performance of that obligation would therefore have to stem from that contract; since P was not a party to it, he cannot recover. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Eng. 1842).

Note: *Winterbottom* itself involved what was clearly nonfeasance, rather than misfeasance. But the principle of that case, that there could be no third-party tort recovery, since there was no privity of contract, came to be applied not only to nonfeasance, but also misfeasance, cases.

1. **Modern development:** Within the last fifty or sixty years, courts have largely scrapped the requirement that a tort plaintiff whose claim arises out of contract must have been in privity with the defendant. This has been most clearly the case with respect to sellers of ***chattels***; most of the chapter on products liability (*infra* p. 259) is devoted to a discussion of how third parties may recover in tort against one who has supplied defective goods. Courts have also begun to scrap the privity requirement with respect to persons who supply ***services***.

★ **Example:** D, a lawyer, prepares a will for Testator. D fails to have the will attested to by the number of witnesses required by statute. Therefore, when Testator dies, the will is not admitted to probate. The Ps, persons who would have been beneficiaries had the will been valid, sue D for negligence. *Held*, for Ps. "Liability for a negligent performance of a contract, or nonperformance, should be imposed where the injury to the plaintiff is foreseeable and where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered . . . " Here, the damage that would result to the Ps from an invalid will was clearly foreseeable; generally speaking, such an error would not be discovered until it was too late to rectify (i.e., when the testator was dead). The fact that the Ps are not in privity with D should not bar them from recovery. *Licata v. Spector*, 225 A.2d 28 (Conn. Ct. Com. Pl. 1966).

IV. MENTAL SUFFERING

A. Duty to avoid imposition of suffering: Suppose the defendant's negligence is the cause in fact of ***mental suffering***, and this suffering has physical consequences (e.g., shock, ulcers, etc.). But suppose further that this suffering has been produced without any ***physical impact*** upon the plaintiff. This might, for instance, be the case if the plaintiff was almost run over by the defendant or saw her child killed by the defendant, etc. In this situation, may the plaintiff recover? The question can be analyzed either in terms of proximate cause (i.e., is emotional suffering unaccompanied by physical impact ever sufficiently foreseeable that it should be regarded as the proximate result of the defendant's conduct?) or, as here, in terms of duty (i.e., does a defendant ever have a duty to guard against the imposition of emotional suffering, even where that suffering is not the result of a physical impact?).

1. **Parasitic element of damages in physical impact cases:** It has always been accepted that where the defendant causes an actual ***physical impact*** to the plaintiff's person, he is liable not only for the physical consequences of that impact but also for virtually all the emotional or mental suffering which flows naturally from it. This includes fright at the time of the injury, "pain and suffering" stemming from the injury, anxiety about possibility of a repetition, humiliation from disfigurement, etc. See Prosser, p. 330. Such damages from mental suffering are often called ***parasitic*** — they attach to the physical injury. The usual reason for allowing them is that the existence of a physical injury provides sufficient assurance that the claim of suffering is not ***feigned.***

B. Mental suffering without physical impact: But where there has been no physical impact or direct injury to the plaintiff, courts have been less willing to permit recovery for emotional suffering. This has been due primarily to the fear that fraudulent claims will be made.

1. **Recovery not allowed where no physical symptoms:** Where there is not only no impact, but no ***physical symptoms*** of the emotional distress at all, courts have almost never allowed recovery. See Rest. 2d, §436A. Thus a plaintiff who claims that the defendant narrowly missed running him over and killing him, but who cannot point to any bodily harm suffered (e.g. shock, nausea, nightmares, etc.) as a result of his mental suffering, will be barred from recovery as a matter of law.

   a. **Rationale:** The theory behind this rule is that where the plaintiff cannot even point to objective physical symptoms of his distress, the risk of fraudulent claims is so great that, as a matter of administrative policy, recovery should never be allowed. A further reason is that "emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles." Rest. 2d, §436A, Comment b.

   ★ **Example:** D negligently constructs a fireplace in P's home. When P attempts to use the fireplace, the flames spread into the room where the

fireplace is located. Although P is not physically harmed by the fire, he does suffer "mental anguish and emotional distress." However, he does not allege that any physical injury resulted from the emotional disturbance. *Held*, for D. " . . . emotional stress must be manifested by physical injuries in actions based on negligence. . . . " *Ver Hagen v. Gibbons,* 177 N.W.2d 83 (Wisc. 1970).

A dissent contended that, since physical harm is not required where emotional distress is ***intentionally*** caused (see *infra* this page), it should not be required in negligence cases either.

b. **Exceptions:** In a few special kinds of situations, some courts have allowed recovery for pure emotional suffering with no physical consequences. First, a minority of courts have allowed such recovery where a ***telegraph company*** has negligently transmitted a message which, on its face, would be expected to cause emotional suffering if erroneous (e.g., "Your son is dead" when he is not). Second, most courts have allowed recovery for negligent mishandling of ***corpses*** (e.g., poor embalming, dismemberment, misplacement, etc.) Like the telegraph company cases, these cases are ones which, by their very nature, are thought to present a likelihood of real suffering, and therefore a guarantee against fake claims. See Prosser, pp. 329-30.

c. **Intentional torts:** Where the defendant's conduct is ***intentional*** or "willful", courts have been much more willing to allow recovery for pure emotional distress. (See *supra*, p. 22). For instance, Rest. 2d, §46(1) allows such recovery where the defendant's conduct is intentional and "extreme and outrageous". This may be ascribed to the general tendency of courts (noted *supra*, p. 9) to impose a broader scope of liability in cases of intentional torts than negligent ones. See, e.g., *Blakeley v. Shortal's Estate*, 20 N.W.2d 28 (Iowa 1945) (holding that where defendant committed suicide in plaintiff's kitchen, plaintiff could recover for fright, absent physical injuries, if the defendant's conduct was "willful".)

2. **Physical injury without impact:** If the defendant's act does not result in an immediate physical impact on the plaintiff, but there is emotional distress which itself has ***physical consequences*** (e.g. miscarriage), courts are divided about whether and when there should be liability.

a. **Demise of "impact" requirement:** At one time, courts held that there could be no recovery where there was no direct ***impact*** upon the plaintiff as a result of the defendant's conduct. However, this impact requirement was gradually eroded (to the point of holding that the plaintiff's own response, such as fainting and falling from fright, could satisfy it — see Prosser, p. 331). In the last fifteen years, the impact requirement has been rejected by every court to consider it, and Prosser believes that it "might perhaps even never be applied again." Prosser, p. 332. Rest. 2d, §436(2), implicitly rejects the requirement.

★ **Example:** D is traveling in his car near the Ps' farm. Through his negligence, the car leaves the highway, flies through the air, and sheers off

a utility pole. Some electric lines, which lead into the Ps' house, snap, and an electrical explosion results. Though they are not directly hit by anything, the Ps suffer an emotional disturbance, with resulting symptoms that are arguably physical (e.g. loss of weight).

Held, " . . . a jury could reasonably find . . . a causal relationship between the fright occasioned by defendant's negligence and the injuries alleged. . . . " Where emotional distress, which is proximately caused by a defendant's negligence, results in a "definite and objective physical injury," the plaintiff may recover. This is true even if there is no physical impact at the time of the frightening event. *Daley v. La Croix*, 179 N.W.2d 390 (Mich. 1970).

A dissent argued that while the overruling of the impact rule might be wise, in this case the Ps didn't really have any objective physical injuries, but just subjective mental ones (e.g. "traumatic neurosis"). Therefore, according to the dissent, the case should fall within the general rule denying liability where there is no physical injury (see *supra*, p. 164).

b. Fear for own safety: The demise of the impact rule has meant that a plaintiff can generally recover when he suffers ***fear for his own safety,*** if this fear leads to physical consequences. Thus one narrowly missed by a negligently driven car may recover against the driver, if he can show the requisite physical results.

3. Fear for safety of others: But what if the plaintiff's emotional distress is suffered not as a result fear for his own safety, but rather, fear for the safety of ***others*** or grief for injury done to others? The issue is most often presented in cases where a ***parent sees his child killed before him.***

a. Zone of danger: Some courts have taken a *Palsgraf* approach to this problem, and have held that a plaintiff who is not endangered by the defendant's conduct is owed no duty, and cannot recover for emotional distress at another's plight, even if this distress leads to physical harm. These courts have therefore required that the plaintiff have himself been within the ***"zone of danger".***

★ **Example:** P gives birth to X in D hospital. In the presence of P, a nurse mishandles X, and drops her on the tile floor. P sees the accident, and hears the sound of X's skull being fractured. P suffers a severe emotional disturbance and sues for the emotional disturbance. *Held*, for D. "It is our view that the plaintiff herein could recover only if the defendant's negligent act had threatened the plaintiff herself with harm or placed her within what is termed the zone of danger." P does not allege that she was so threatened, or that she was in the zone of danger. *Whetham v. Bismarck Hospital*, 197 N.W.2d 678 (N.D. 1972).

Note: P was, however, allowed to recover for the direct injuries to her child.

i. Within the zone: If the plaintiff was within the zone of danger, and in theory suffered at least some fear for his own safety, he may be able to recover as well for distress or fear for the safety of others. See, e.g.,

Hambrook v. Stokes Brothers, 1 K.B. 141 (Eng. 1925). The theory behind this result is that the defendant has been negligent toward the plaintiff (in the sense of imposing an unreasonable risk upon him), and is therefore liable for any harm incurred even if it occurs in a somewhat unforeseeable manner (see *supra*, p. 128).

ii. **Contrary view:** But other courts have refused to allow recovery for the distress and injury to others, even if the plaintiff was in the zone of danger. Prosser suggests that these cases intimate "that it is not the unforeseeable plaintiff but the nature of the injury which is the real obstacle." Prosser, p. 334.

b. **California abandons zone of danger requirement:** A few states, most notably California, have ***abandoned*** the requirement that the plaintiff have been within the zone of danger in order to recover for distress and injury to others. In the California case, ***Dillon v. Legg,*** 441 P.2d 912 (Cal. 1968), a young girl was run down by the defendant's automobile, in front of her mother and sister. The sister was in the "zone of danger", in that she was a few feet away; the mother was standing on the sidewalk, close enough to get a good view but far enough so there was no direct danger to her. The court pointed out the anomaly of allowing the sister to recover but not the mother, where both had suffered the same type of distress, but one had fortuitously been a few feet closer to the accident.

i. **Factors:** The *Dillon* majority listed several factors which should henceforth be used in determining whether the bystander's mental distress was sufficiently foreseeable that it should be compensable. These were (1) the plaintiff's nearness to the accident; (2) whether the plaintiff witnessed the accident first hand, as opposed to learning about it from others after the fact; and (3) whether the plaintiff and victim were closely related. All these factors should be weighed in each particular case, to determine whether the risk of emotional distress was reasonably foreseeable. (The court's implication was that all three would not necessarily have to be present in every case for there to be recovery.)

ii. **Other states slow to join:** Thus far, only a few other states have followed the *Dillon* court's abolition of the zone of danger requirement. These include Connecticut, Hawaii, and Rhode Island (as anticipated by a Federal judge sitting in diversity). See P,W&S, p. 421. The courts of Louisiana, New York, New Hampshire and Vermont, among others, have explicitly rejected this approach. (*Ibid*).

iii. **Restatement view:** The Second Restatement continues the "zone of danger" requirement. If the plaintiff is placed in danger of physical harm, he may recover for distress at seeing a member of his immediate family hurt in his presence. (§436(2) and (3)). This is because the defendant has "violated an original duty to the plaintiff" (by putting him in danger of physical harm). (§436, Comment h.) But where there is no physical danger to the plaintiff, he may not recover for emotional distress and harm to third persons. (§313(2)).

c. **Need for limitation:** Observe that there must be ***some*** kind of limitation of liability for bystanders' emotional distress. Otherwise, in every car accident or near car accident, there might be tens or hundreds of potential plaintiffs, each of whom could claim to have been emotionally distressed by what he saw (or later read or heard about). The *Dillon* court's listing of factors to be considered can be viewed as simply a special case of the general principle that one is liable only for reasonably foreseeable consequences. A defendant can be expected to foresee the possibility that, where a child is endangered by his act, its mother may be near by and be distressed. But there is no reason for him to foresee that a casual bystander will suffer similar distress, leading to physical consequences, or that such a bystander will be unusually sensitive or neurotic. See Prosser, pp. 334-5.

V. UNBORN CHILDREN

A. Scope of problem: Can one ever owe a duty of care to a child who is, at that time, ***unborn?*** Until 1946, all courts agreed that the answer was "no". This meant that, for instance, if the defendant injured a mother in a car accident, and the foetus she was carrying was later born with injuries directly sustained in the accident, the infant could not recover. (The mother, however, could recover for mental distress at having an injured child, medical payments required for treatment of the child's injuries, etc.)

B. Modern view: Starting in 1946, one court after another overruled the bar on liability for pre-natal injuries. This now appears to have been universally done, and Prosser calls this overruling "up to that time the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." Prosser, p. 336.

1. **Liability:** A few cases have implied in dicta that for there to be recovery, the child must, at the time of injury, have been ***"viable"*** (i.e., capable of surviving if placed in an incubator). But all courts directly confronted with the issue seem to have permitted recovery even where the foetus was only a few weeks old at the time of injury. The soundness of this is indicated by the Thalidomide scandal, which proved that external forces can cause drastic injury to an embryo that is far from being viable.

   a. **Restatement cautions:** But the Second Restatement, §869, Comment d, notes that the causal link between the defendant's act and injury to a just-recently-conceived embryo can be extremely speculative and unreliable, and suggests that courts require "convincing evidence" of causation in this circumstance.

2. **Requirement that child be born alive:** Suppose the foetus, after being injured, is ***still-born.*** May an action for its wrongful death (see *infra*, p. 200) be brought? The question usually turns on what the state legislature meant by the use of the word "person" when it provided a statutory right to a wrongful death action by persons. Most courts have allowed recovery in this situation. But
★ almost as many have not; see, e.g., *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969), a case involving an automobile accident which caused twin foetuses to be

still-born. The court held that allowing a wrongful death action on behalf of a still-born child would give the parents more-than-fair compensation, since the mother already has her own action for miscarriage. Furthermore, the court noted, this situation must be distinguished from that in which a pre-natual injury occurs and the infant is born defective; in the latter case, the infant is compensated for having to go through life "bearing the seal of another's fault." This is not so in the still-birth situation.

a. **Restatement view:** The Second Restatement, §869(2), would not allow recovery "unless the applicable wrongful death statute so provides."

3. **"Wrongful life":** A recent controversy, perhaps more significant to law review writers and professors than to practicing lawyers, concerns what might be called ***"wrongful life"*** actions. Suppose a child is born illegitimate, or born unwanted because of a faulty contraceptive, or born with a congenital disease which could not have been prevented, but which, had it been diagnosed *in utero*, could have led to an abortion. In this circumstance, may the child argue that it would have been ***better off not being born at all,*** and is therefore entitled to damages for life?

a. **Illegitimacy:** In the case of children born illegitimate, the courts have universally refused to allow an action against the parents, on the grounds that it is better to have been born a bastard than not to have been born at all. See *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. App. 1963).

b. **Faulty contraception:** If the child is born unwanted due to the defendant's furnishing of a defective contraceptive or performance of a faulty sterilization, courts have sometimes allowed recovery. Generally, however, this has been in the form of an award to the parents of the extra costs of raising the child or the pain and suffering and medical expenses of an unwanted pregnancy, not an award to the child for "wrongful life". See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. 1974).

c. **Congenital defect:** The most troubling cases are those in which the child suffers from a severe congenital disease which, had it been diagnosed during pregnancy, might have led the mother to abort. Here, the impaired child seems to have a much stronger claim that he would be better off never having been born. Apparently, no court has yet explicitly allowed a
★ "wrongful life" recovery in this situation. See, e.g., *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967), in which it was alleged that the defendant physicians had failed to advise the plaintiff's mother that her attack of German measles early in pregnancy might cause birth defects. The deaf, retarded and nearly blind child was refused recovery on the grounds that "this Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossiblity of making the comparison required by compensatory remedies."

i. **Damages for suffering:** But a recent New York lower court opinion

has reached the same result as that desired by the plaintiff in *Gleitman* by a slightly different route. In *Park v. Chessin*, 387 N.Y.S.2d 204 (N.Y. Sup. Ct. 1976), a suit was brought on behalf of a child who died at the age of two and one-half, of kidney disease. The complaint alleged that the defendant physicians had knowledge, prior to the plaintiff's conception, that a previous child born to these parents had the same kidney disease, and that this disease was congenital. It was malpractice, the suit stated, for the defendants not to have counselled against a second pregnancy for the plaintiff's mother. The court denied the defendants' motion to dismiss, on the grounds that this was not really a suit for "wrongful life", but rather, a suit for the actual pain and suffering which the child endured during her two and a half years of life.

OWNERS AND OCCUPIERS OF LAND

Introductory note: The common law, up through the nineteenth century, was strongly influenced by the primarily agrarian and rural nature of both the English and American economies. These societies, being sparsely settled as they were, were able to nuture the view that an individual's land was his to do with as he pleased. Consequently, a number of detailed, specialized rules arose concerning the duties of owners and occupiers of land towards other persons, both on and off the premises. These rules were not merely clarifications of what constituted "due care", but were on the contrary rules sharply reducing the duties of landowners and occupiers, holding them to a standard of care markedly lower than that which, to our modern eyes, would be shown by the typical "reasonable man".

This chapter summarizes these various common law rules, and also shows the process whereby modern courts have liberalized and, in some cases, abandoned, these principles in favor of a more general duty of due care.

I. OUTSIDE THE PREMISES

A. Natural v. artificial conditions: Whatever socio-economic reasons there have been for imposing a low standard of care upon landowners vis-a-vis persons upon their land, these reasons are less compelling when the landowner's conduct has effects ***outside*** of his property. Landowners have therefore generally been held liable for conditions upon their land which pose an unreasonable risk to persons outside of it. See Rest. 2d, §§ 364, 365. There are, however, some exceptions to, as well as special clarifications of, this rule. The most important of these is the distinction between naturally existing hazards and artifically created ones.

1. **Natural hazards:** Where a hazardous condition exists ***naturally*** upon the land, it has almost always been held that the property owner has ***no duty*** to remove it or guard against it, even if it poses an unreasonable danger of harm to persons outside the property. See Rest. 2d, §363(1).

   Example: D occupies property on a hill above P's property. A five ton rock falls off the hill and damages D's house. Conditions indicate that further rock falls are likely. P, and the town in which he and D reside, seek a declaration that the rocks are a nuisance, and an order compelling D to remove them. *Held*, the rocks are "part of the natural formation", and D has no duty to take any action to prevent harm to his neighbors. *Pontardawe Rural District Council v. Moore-Gwyn*, 1 Ch. 656 (Eng. 1929).

   a. Trees: In ***rural*** areas, this rule continues in force, even where the hazard consists of ***trees*** which fall onto the public highway. Thus, in *Lemon v.* ★ *Edwards*, 344 S.W.2d 822 (Ky. 1961), the court refused to hold the defendant liable for injuries the plaintiff sustained when her car, riding on the public road, was smashed by a rotten tree on D's property; the court pointed to the

fact that D's property was forest land in a "sparsely settled area", and said that to require D to avoid such accidents, or even to inspect his trees, would be "an unreasonable burden in comparison with the risk involved".

b. **Urban area trees:** But in more thickly settled, ***urban*** areas, owners have generally been required to prevent trees on their property from posing an unreasonable risk of harm to persons on the public roads. This means that not only must they remove rotten trees where they know of the danger, but also that they probably have an affirmative duty to ***inspect*** to discover such defects. See Rest. 2d, §363(2).

2. **Artificial hazards:** Where the hazardous condition is ***artificially*** created, however, the owner has a general duty to prevent an unreasonable risk of harm to persons outside the premises. This includes not only man-made structures, but also living things which have been artificially placed on the land (e.g. shrubs) as well as changes in the physical conditions of the land (e.g. excavations). Rest. 2d, §363, Comment b.

a. **Danger to persons on highway:** Most of the cases falling under this rule have involved danger to persons on an ***adjoining public road*** (usually called a "highway", even if only a seldom-travelled public street.)

b. **Foreseeable deviations:** This duty is owed not only to those who use the public road, but also those who, while using it, predictably ***deviate slightly*** from it onto the owner's land. Thus a property owner will be liable where he places an unreasonably dangerous excavation next to a public sidewalk, and the plaintiff unwittingly falls into it; see, e.g., *Downes v. Silva*, 190 A. 42 (R.I. 1937). Similarly the defendant is liable if he places a building next to the sidewalk, with a side door in it which is not locked and which opens into a twelve foot drop to the basement, injuring children who lean against it;
★ *Lacanfora v. Goldapel*, 323 N.Y.S.2d 990 (Sup. Ct. N.Y. 1971). The issue is whether the plaintiff's deviation is "reasonably foreseeable"; it is usually held that deviations by children are more foreseeable than those by adults.

c. **Telephone poles and other above-the-ground objects:** But where a property owner maintains a necessary ***above-the-ground object***, such as a ***telephone pole*** or ***mailbox***, courts are reluctant to impose liability when a
★ person using the adjoining road collides with the object. Thus in *Hayes v. Malkan*, 258 N.E.2d 695 (N.Y. 1970), the court held that D (Consolidated Edison Co.) was not liable when P collided with D's telephone pole, located on private property seven inches from the road. The court distinguished this from situations in which an unguarded excavation is maintained on private property, holding that the latter is a "trap", and that a telephone pole or mailbox, insofar as it is above the surface and sizeable, is not.

B. **Conduct of others:** The landowner's duty of reasonable care may require him to ***control the conduct of others,*** whose behavior on his property may cause injury to those off it.

1. **Employees:** This is of course true with respect to the owner's ***employees*** under

the doctrine of *respondeat superior* (discussed *infra* p. 238).

2. **Contractors:** Similarly, the landowner may be responsible for the negligence of an ***independent contractor***, if the contractor's work is inherently dangerous to those off the premises (see *infra*, p. 244).

3. **General rule:** But even more generally, the owner is responsible for preventing the activities of anyone on his property if he knows or should know there is danger to outsiders. Thus the owner of a hotel was liable to a passer-by who while on the adjoining sidewalk was hit by an object thrown by a drunken Junior Chamber of Commerce conventioneer staying at the hotel; *Connolly v. Nicollet Hotel*, 95 N.W.2d 657 (Minn. 1958). Similarly, the owner of a baseball park was liable for injury to a pedestrian arising from one of a continual series of foul balls hit by the players; the court asserted that the public has "a right to the free and unmolested use of the public highways", and that the owner was required to take reasonable precautions (e.g. a higher fence) to guard against such injuries.
★ *Salevan v. Wilmington Park, Inc.*, 72 A.2d 239 (Del. 1950). See Rest. 2d §318.

II. INJURIES ON THE PREMISES GENERALLY

A. Detailed rules: It is where injuries occur ***on*** the owner's premises that the detailed and restrictive rules on liability referred to at the beginning of this chapter take effect.

1. **Possessor v. owner:** These common law rules were designed to encourage the full exploitation of land. Therefore, the beneficiary of the rule is the ***possessor*** of the land, not the abstract legal owner. The most important consequence of this fact is that when a ***tenant*** takes possession of property, even if only for a very short period, he is the one who gets the benefit of these specialized rules. The lessor, once he gives up possession, loses the benefit of these rules, although there are other rules (discussed *infra* p. 185) which also curtail the degree of care which he is required to show.

2. **Family and employees of possessor:** The benefits available to the possessor are also shared, according to most courts, by members of the possessor's ***household*** as well as persons working on the land for his benefit either as ***employees*** or ***independent contractors.*** See Rest. 2d, §384.

   a. **Others:** But third persons who are merely ***permitted*** to come onto the possessor's land for their own benefit do not have this status, and they will usually be held liable to third persons injured, under the more general "reasonable man" standard examined in previous chapters.

   ★ **Example:** D Power Company's transmission line is destroyed by flood, so it obtains permission from X, a local landowner, to string a temporary line over his land. P, a hunter trespassing on X's land, is electrocuted by the line, and sues D. D seeks the benefits of the special rules limiting the duties of care owed to trespassers (discussed *infra*). *Held*, these special rules apply only where the defendant is the actual possessor of the land. Since D was not the possessor and was allowed onto the land for its own purposes, it

must be judged by a standard of ordinary "reasonable care". *Humphrey v. Twin State Gas & Electric Co.*, 139 Atl. 440 (Vt. 1927).

3. **The term "owner" used for convenience:** In this outline the terms "landowner" or "property owner" are used, for convenience, to designate the person who as possessor of the land has the benefit of these special rules.

B. Three categories: The common law evolved a rigid series of categories of plaintiffs, as to each of which the landowner owed a sharply differing duty of care. The three principal classes were ***"trespasser", "licensee"*** and ***"invitee".*** The "trespasser" was one who had no right at all to be on the land; the "licensee" was one who came on the land with the owner's consent, but as a social guest (not a business visitor), and the "invitee" was one who came with a business purpose. The owner's duty of care with respect to the "trespasser" was the least, and that with regard to the "invitee" the greatest.

1. **Present significance:** As is discussed *infra*, p. 184, the significance of these three rigid categories, and the duties relative to each, have been rejected or modified by at least some modern courts, but most courts continue to apply them. Therefore, the highly formalistic rules for determining which category a particular plaintiff falls into must be carefully studied.

III. TRESPASSERS

A. General rule as to trespassers: The general rule is that the landowner owes ***no duty to a trespasser*** to make his land safe, to warn of dangers on it, to avoid carrying on dangerous activities on it, or to protect the trespasser in any other way. The theory behind this view is that a property owner should be entitled to use his land as he wishes, without worrying about the safety of those who have no right to be on it. See Rest. 2d, §333.

★ **Example:** P trespasses along D Railroad's track. His foot gets caught in the track bed, and he is run over by one of D's trains, which fails to stop in time. D alleges both that the roadbed was negligently maintained, and that D's employees were negligent in not stopping in time. *Held*, since P was a trespasser, D owed him no duty of maintaining the roadbed, train brakes or other equipment in a safe condition, or of running the train at low enough speeds to be safe. D may have owed P a duty of reasonable care once his presence was discovered (one of the exceptions discussed below), but as to this duty, the evidence is that D's employees met this standard. *Sheehan v. St. Paul & Duluth Ry. Co.*, 76 F. 201 (7th Cir. 1896).

B. Exceptions: There are a number of exceptions to this general absence of a duty of care to trespassers. The more important of these are as follows.

1. **Constant trespass on limited area:** If the owner has reason to know that a ***limited portion*** of his land is ***frequently used*** by various trespassers, as a crossing or path, he must use reasonable care to make the premises safe, or at least, to warn them of dangers which they would probably not otherwise

discover. Rest. 2d, §§ 333, 334.

a. **Railroad crossing:** This principle has been most frequently applied in cases of persons injured while using a well-travelled path across or along a ***railroad***; it is held that the trains must be operated with reasonable care (e.g., with warning whistles) to protect the trespassers. See, e.g., Rest. 2d, §334, Illustrations 1-3.

2. **Discovered trespassers:** The most important exception to the general rule of non-liability to trespassers is that once the owner has ***knowledge*** that a particular person is trespassing on his property, he is then under a duty to exercise reasonable care for the latter's safety. Rest. 2d, §§ 335, 336.

a. **Natural conditions:** This exception clearly applies where the danger to the discovered trespasser arises from the owner's physical activities (e.g., running a train), or from "artificial conditions" on the land (e.g., an excavation). Where the condition is a purely ***natural*** one, however, (e.g., a hidden bog), it is not clear whether the exception will apply; see Rest. 2d, §337, Comment b stating that the exception should, in theory, apply. See also *Loney v. McPhillips*, *infra*, p. 177, holding that a similar exception concerning trespassing children does not apply in the case of natural hazards.

b. **What constitutes discovery:** The duty of reasonable care is triggered not only when the owner ***actually*** learns of the trespasser's presence, but also, when he is confronted by evidence which ***should*** reasonably lead him to the conclusion that a trespasser is present and in danger.

★ **Example:** P, while waiting for the D subway, slips and falls onto the tracks. An approaching train automatically stops when a "tripper" on it registers the presence of an object on the tracks. A bystander tells the conductor that there is a man on the tracks, but the conductor looks with a flashlight and finds nothing. The train is restarted and runs over P. *Held*, although P is not technically a trespasser (since he did not voluntarily enter D's property), his status is the same as if he were. If D's employees should reasonably have realized from the circumstances that there was someone on the tracks, they had a duty to use due care. The questions of whether they had such notice, and whether, if they did, they used due care under the circumstances, were properly for the jury (and not for the trial judge, who erroneously granted the defendant a judgment n.o.v.) *Frederick v. Philadelphia Rapid Transit Co.*, 10 A.2d 576 (Penn. 1940).

c. **"Wanton and willful" requirement:** Some courts have held that the defendant is liable only if, following the discovery of the trespasser, he disregards the latter's safety ***"wantonly and willfully"***. But this standard has either been rejected by most courts in favor of a simple due care standard, or, as occurred in *Frederick*, interpreted in such a way that lack of due care following discovcery of a trespasser is automatically deemed "wanton". See Prosser, p. 362.

d. **Sufficiency of warning:** The defendant will often be able to satisfy his burden of due care merely by ***warning*** the trespasser; this will be so where the owner reasonably believes that the trespasser will respond to such a warning.

i. **Warning ignored:** But once it becomes apparent that the warning will not be respected (e.g., where the trespasser makes no move to leave the train tracks following the engineer's blowing of his whistle), the duty then becomes to use other means to avoid harm.

3. **Trespassing children:** More liberal (to the plaintiff) rules have arisen where the trespasser is a ***child***. This is due to several factors: a child is usually less able to appreciate the dangers posed by strange conditions than an adult; children trespass more frequently than adults and therefore danger to them is more foreseeable; and courts are naturally sympathetic to injured children.

a. **"Attractive nuisance":** Originally, a child plaintiff got the benefit of a more lenient rule only where his case fell within the so-called "***attractive nuisance***" doctrine. This doctrine imposed liability upon a landowner who maintained an injurious condition on his land which, because it made an enticing plaything, induced children onto the land. The doctrine was strictly interpreted by Justice Holmes in the well-known case of *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922), in which it was held that there was no liability where the child was not attracted onto the land by the thing which injured him, but by something else.

b. **Modern view:** Most modern courts reject the *Britt* requirement that the child have been attracted by the particular condition which ends up injuring him. However, there are a number of special conditions which must be met before there will be liability to a trespassing child (assuming this is not one of the situations in which there would also be liabilty to a trespassing adult, such as the "continued trespass upon a limited area" exception, discussed above). These requirements are set forth in an influential Restatement provision, Rest. 2d, §339:

i. **Likelihood of trespass:** First, the owner must have reason to know that the condition in question is in a place on his land where ***children are likely to trespass;***

ii. **Danger:** The owner must also have reason to know of the condition, and have reason to know that it poses an ***unreasonable risk*** of serious injury or death to trespassing children;

iii. **Children ignorant of risk:** The injured child must, because of his youth, either not have discovered the condition or not ***realized the danger*** posed by it;

iv. **Utility:** The ***benefit*** to the owner of maintaining the condition in its dangerous form must be ***slight*** weighed against the risk to the children, and;

v. **Lack of reasonable care:** The owner must fail to use ***reasonable care*** to eliminate the danger or protect the children.

c. **Other issues:** Several issues have frequently arisen in connection with the "trespassing children" doctrine.

i. **Age of children:** How ***young*** must the child be to gain the benefit of the rule? Originally, many courts imposed a firm rule that the child had to be under twelve. But the modern view seems to be that the child must simply be so young that he is unable to appreciate the risk of the particular condition. This means that where the risk is a familiar one, such as that of drowning in a body of water, a relatively young child may be expected to understand the risk. A power cable, on the other hand, may pose such a sophisticated danger that even a child of sixteen will not be expected to be on his guard, and may recover. See Prosser, p. 374. The question apparently has both a subjective and objective aspect; that is, requirement (ii) above is met if the owner has reason to believe that the condition is dangerous to children of the age who are likely to trespass (even if the child who is injured is of a different age category). But the actual injured child must not have appreciated the danger, and will be barred from recovery if, say, he had particular knowledge, unusual for one so young, of the danger (e.g., a nine year old who is the son of a railroad engineer, and has been warned many times of the dangers of railroad turntables, but nevertheless injures himself. See Rest. 2d, §339, Illustration 8.)

ii. **Natural conditions:** The rule recited in the Restatement applies only to "artificial conditions" on the land. As to "activities" carried on upon the land (e.g., the running of a railroad), trespassing children receive no greater protection than adults (and must fall within one of the above exceptions to recover). Where the danger comes from a "condition", but from one which is ***"natural"*** rather than "artificial", the rule is unclear. The Restatement, in §339, has a caveat on this issue, stating that most of the existing cases denying liability for natural conditions are ones where the child ought to have been familiar with the risk (e.g., a body of water), and also, generally, where the condition would have been unreasonably expensive to protect against.

iii. **No liability:** But at least one recent case, *Loney v. McPhillips*, 521 P.2d 340 (Ore. 1974), expressly based its denial of liability on the fact that the condition was a natural one. In that case, the trespassing child was a thirteen year old boy who drowned in an ocean cove near a public highway, which was especially dangerous at high tide. There is no indication in the court's decision that the danger should have been obvious to the boy, or that it would have been disproportionately costly to fence off the cove. Instead, the court referred to an Oregon statute embodying a policy of encouraging landowners to permit the use of their land for recreational purposes. A dissent argued that there is nothing sacred about a natural condition, and that if foreseeable child-

trespassers could be protected at reasonable cost (e.g., by having signs), and the danger is not readily apparent, such protection should be required.

c. **General negligence standard:** The various requirements of Rest. 2d, §339, really amount to imposition of what is almost a usual "reasonable man" standard of negligence. Thus in most courts, "child trespasser law is merely ordinary negligence law", with a few exceptions. Prosser, p. 366. This means that the owner does not have to make his premises "child-proof", but must merely take "reasonable measures" to prevent harm; a warning, for instance, may often suffice.

d. **Child invitees and licensees:** What if the child is not a "trespasser", but a "licensee" or "invitee"? It is universally agreed that such a child should have at least the benefit of the above "child trespasser" rules. Furthermore, he may gain even greater protection by virtue of the rules governing invitees and licensees discussed below; these, however, do not generally make special allowances for children.

e. **No duty of inspection:** The child trespasser rules do not generally impose any ***duty of inspection*** upon the landowner. He is not required to inspect in order to determine whether children are likely to trespass, nor is he required to inspect to see if there are any dangerous conditions of which he otherwise would not have any reason to know. See Rest. 2d, §339, Comment g.

IV. LICENSEES

A. Significance of being a "licensee": The next step up from the lowly "trespasser" is the so-called ***"licensee"***. A licensee is a person who has the owner's ***consent*** to be on the property, but who does ***not have a business purpose*** for being there, or anything else entitling him to be on the land apart from the owner's consent. See Rest. 2d, §330. As is outlined below, the licensee is the beneficiary of a somewhat higher standard of care than is the trespasser, but a lower standard than would be owed to a business visitor or other "invitee".

B. Social guests: The main class of persons who qualify as licensees are "***social guests***". Such a guest, even though he is "invited" by the owner, is not an "invitee", since that term applies only to business guests and other persons identified *infra*, p. 180. And the social guest will not become an "invitee" even by gratuitously doing ***incidental services*** (e.g. washing dishes).

★ **Example:** D invites P over to her house, saying either "Come over and have supper and visit" or "Come over and have supper and stay with my sister-in-law while I go to church" (depending upon which of two disputed versions is believed.) P accepts the invitation, and while sitting on D's porch, is hurt when D's porch swing falls on her foot. *Held*, whichever of the two statements was made by D, P was purely a social guest, and is therefore a "licensee", not an invitee. Consequently, D owned her no duty of inspecting the swing to make it safe, as she would have if P had been an "invitee". *Hall v. Duke*, 513 S.W.2d 776 (Tenn. 1974).

1. **Rationale:** The principle difference between the duty owed to a licensee and that owed to an invitee is that as to the former, there is ***no duty to inspect for unknown dangers*** (see *infra*, p. 182). Accordingly, the rationale for holding that a social guest is only a licensee is that such guests commonly understand that the owner will not take any special precautions for their safety. That is, the guest understands that he takes the premises on the same footing as the owner himself. This theory may not be in accord with how hosts and guests usually act, but the conclusion drawn from it, that social guests are not "invitees", is well-established. See Rest. 2d, §330, Comment h(3).

2. **Duties to licensee:** Since, as just noted, courts presume that the licensee takes the premises on the same footing as the owner, the owner is required to use reasonable care to place him in the same position of relative safety as himself. This means in particular that where the owner ***knows*** of a ***dangerous condition***, which he should reasonably anticipate that the licensee may not discover, he must ***warn*** him of that danger. (But a warning of the danger is all that is required; the owner is not required to remedy what he knows to be a defective condition.)

   a. **Natural conditions:** This general duty to warn includes dangers arising from ***natural conditions***, (even though such conditions are exempted where owner liability to persons outside the premises or to child trespassers is concerned.) See Prosser, p. 381.

   b. **No Duty to Inspect:** But very significantly, the owner is not required to take affirmative action to make the premises safe. This means that he has ***no duty to inspect the premises*** to find any hidden dangers; nor is he liable if the premises are unsafe becasuse of faulty construction. See Rest. 2d, §342, Comment d.

C. **Dangerous activities:** Most courts now distinguish between passive conditions on the land (discussed above), as to which the owner has no duty of inspection, and ***activities*** carried out by him on the land, as to which an affirmative obligation of due care to licensees is required. Thus if the owner runs trains on his property, he has an affirmative obligation to do so with reasonable care for the safety of any licensee; reasonable care in a particular situation may require that the owner actively keep an eye out for licensees, even if he does not know of their presence. (His duty is thus higher than it is to trespassers, as to whom there is no obligation until they are actually discovered.)

D. **Automobile guests:** A ***guest passenger*** in an automobile is sometimes held to be bound by the same rules as a licensee upon land. As was noted previously, *supra*, p. 94, the status of an automobile guest is regulated by statute in most states, but where there is no statute, courts have frequently held that the guest (assuming that he is a social, rather than business, guest) is owed no duty of inspection.

1. **Consequence:** This means that if the owner/driver carelessly fails to inspect the car's brakes, and the guest is injured, there will be no liability, on the theory that the defective condition was like a passive condition upon land. (Prosser criticizes

this theory, noting that driving a car with bad brakes is really a dangerous activity, as to which a landowner owes his guest reasonable care, including reasonable inspection. Prosser, p. 383.)

V. INVITEES

A. Significance of distinction from licensees: As noted, the major difference between "invitees" and "licensees" is that only to the former does the owner owe a duty of reasonable inspection to find hidden dangers, and of affirmative action to remedy such conditions. What he must do to satisfy this burden is discussed below.

B. Who is invitee: The modern view, shared by most courts as well as Rest. 2d, §332, is that the class of "invitees" consists not only of persons who are invited by the owner onto the land to conduct (directly or indirectly) ***business*** with him, but also those who are invited as members of the public for purposes for which the land is held ***open to the public.*** The former are called by the Second Restatement (*ibid*) "business visitors" and the latter "public invitees".

1. **Old view:** A number of courts formerly held that there ***had*** to be some business purpose in the plaintiff's visit before he could be an invitee. However, this led courts following this view to stretch to unreasonable lengths to find some kind of indirect business purpose.

2. **The modern view:** The majority position today includes members of the public who come onto land held open to them within the class of invitees, and relies on the fact that such persons ***reasonably expect that the premises have been made safe for them.***

   ★ **Example:** P1 is carrying her infant son, P2, into a free infant-care clinic run by D hospital, when she trips on a flight of stairs. D argues that both Ps were only licensees, since there was no "economic benefit" to D from their presence at the clinic. *Held*, the jury could properly decide that both Ps were invitees. It is not a requirement for that status that there be an economic benefit to D; it suffices that the premises were held open to members of the public for a purpose for which the Ps were in fact using them, i.e., a clinic. Furthermore, the hospital was generally open to the public for the purpose of promoting community health, and anyone there for that purpose would be an invitee. The jury could also properly find that D neglected its duty to see to it that the stairs were safe, since there was evidence of faulty construction and maintenance. *Dowd v. Portsmouth Hospital*, 193 A.2d 788 (N.H. 1963).

   a. Scope of "business visit:" Where the plaintiff tries to come under the "business visitor" branch of invitee status, it is not required that he have engaged in business at the time of his injury, or even on the visit in question, as long as he has a ***general business relationship*** with the defendant.

   ★ **Example:** D runs a cigar stand in a building. P, who has been D's customer for many years, loiters in front of the stand one day for fifteen

minutes, without making a purchase, and then goes to use a toilet in the building. On the way, he falls into an open trapdoor in a dark hallway. D, predictably enough, argues that P was not an invitee, since he made no purchase on the day in question, and since the toilet was not open to the public (but was intended just for D's employees). *Held*, P had been allowed to use the toilet many times in the past, and there was no indication that it was not a public toilet. Furthermore, P is not blocked from obtaining invitee status merely because he made no purchase on the day in question; anyone who enters a store with the present or future intention of being a customer is an invitee, since the owner implicitly invites him for a potential business purpose. *Campbell v. Weathers*, 111 P.2d 72 (Kan. 1941).

b. Salesmen and job-seekers: Even in the case of business visitors, the test is whether these visitors reasonably believe that the premises have been held open to them for the ***particular purpose*** on which they enter. Thus a job-applicant at a department store is an invitee, even if the store rejects his application, as long as the applicant reasonably believes that there is a possibility of employment. The same is true of a salesman who calls on business premises, in a situation where he reasonably believes that such door-to-door salesmen are sometimes received. But a salesman paying an unsolicited call to a ***private home*** is not an invitee at the outset; this is because he cannot reasonably anticipate that the premises have been especially made safe for him. (But if he is invited in, he then becomes an invitee.) See Rest. 2d, §332, Comment b.

3. Scope of invitation: Since the theory behind expanded liability to invitees is that the premises have been made safe for such persons and held out to them, it follows that a visitor who is an invitee as to one part of the premises may become a licensee or even a trespasser if he goes to other parts of the premises ***beyond his invitation.***

a. Implied invitation: However, the test is always what ***reasonably appears*** to the visitor; if it reasonably seems to him that the premises are open to the public, he will not cease to be an invitee merely because, unknown to him, the owner intends that portion to be off limits to anyone except employees. Thus in *Campbell*, *supra*, the plaintiff continued to be an invitee when he went to the toilet, since he had never been informed in the past that it was not for public use.

b. Private portion used with owner's consent: Suppose the invitee receives the owner's explicit authorization to go into a portion of the premises not usually open to the public. If the visitor does so purely for his ***own benefit***, he will generally not be an invitee when he does.

★ **Example:** P buys some cigarettes in D's grocery store. P then asks for an empty box for his son, and is told that he can find some in the back room. The back room is unlit, and he falls down a stair well. *Held*, P was only a licensee once he went into the back room. In doing so, he was not furthering the business for which he was originally implicitly invited onto the premises (i.e., to make a purchase). *Whelan v. Van Natta*, 382 S.W.2d 205 (Ky. 1964).

c. **Time period:** Similarly, a guest will cease to be an invitee if he remains on the premises for a longer ***period of time*** than reasonably necessary for the business purpose for which he has been invited.

C. **Duty of due care:** The owner must exercise reasonable care for the safety of his invitees. His duty is in theory no different from that of, say, a driver towards pedestrians. But in the case of land, specific rules define what constitues reasonable care.

1. **Duty to inspect:** Most importantly, the owner may not impose unreasonable risks of harm upon his invitee, even from dangers as to which the owner is ***unaware.*** This means that the owner has a ***duty to inspect*** his premises for hidden dangers. This does not mean that he must, as an absolute matter, find all such hidden dangers; it merely means that he must use ***reasonable care*** in making his inspection. Rest. 2d, §343.

   a. **Construction defects:** The owner may be liable even for dangers stemming from an original ***faulty construction or design,*** if it poses unreasonable danger to his invitee. And this may be true even if the condition existed ***before the owner ever came into ownership*** or possession of the property. Prosser, p. 393.

2. **Duty varies with use:** What constitutes "reasonable care" on the part of an owner will vary with the use of the premises. Thus the owner of private home, who invites a travelling salesman in for a consultation, owes a lesser duty of inspection than the owner of a major department store, who must anticipate the thousands of customers whose safety may be at stake. See Rest. 2d, §343, Comment e.

   a. **Sufficiency of warning:** The owner's duty of exercising "reasonable care" will often be satisfied by the mere giving of a ***warning*** of an dangerous condition. This would certainly be true, for instance, of the homeowner/travelling salesman situation, where a warning "Be careful of the baby's toys" would suffice and it would be unnecessary to clean up the mess instead.

   b. **Sometimes insufficient:** But there are situations in which the ownner should know that a warning will ***not suffice to remove the danger;*** if so, he must take other affirmative action to protect the invitee. This may be the case where the owner should realize that the warning (e.g. a posted sign) will not be noticed, or that even if noted, the invitee will still be subject to unreasonable danger.

   ★ **Example:** D sells Christmas trees at his nursery. In December, P comes to buy a tree, and is directed out to the back where some of the trees are located. The path consists of planks most of which are covered by asphalt to prevent slipperiness; D has also posted a sign cautioning customers to be careful not to slip. P slips on an uncovered plank and sues. The trial judge charges the jury that D had a duty either to warn or to take other steps to correct the danger; the jury finds for D. *Held*, on appeal, the judge's charge

implied that a warning would necessarily be sufficient and was therefore erroneous. This may have been a situation in which even a plaintiff aware of the danger would be subject to unreasonable risks. The jury should therefore have been charged that in such a situation, D must take affirmative steps to prevent the danger (e.g., putting an asphalt on the walkway which, unlike that used by D, was of a different color than that of the planks themselves.) *Wilk v. Georges*, 514 P.2d 877 (Ore. 1973).

i. **Distraction:** One common situation in which a warning is not sufficient is where a storekeeper should know that there is a good chance that a customer will be ***distracted*** from the danger by goods placed on display. See, e.g., Rest. 2d, §343A, Illustration 2.

c. **Knowledge by invitee:** The same rules apply if the invitee knows of the danger through his own observation, even in the absence of a warning from the defendant. That is, the defendant normally has no further duty in this situation, but he will have a duty to obviate the danger if even a visitor aware of the danger would be subjected to unreasonable risks. For instance, a train passenger confronted with an icy platform might have no choice except to confront the danger or forego the use of the train; if so, the railroad might be liable for the icy conditions despite the passenger's knowledge of the danger, if the platform could not be crossed with reasonable safety. See Rest. 2d, §343A, Illustrations 6 and 8.

d. **Control over third persons:** Reasonable care by the owner may require that he exercise ***control over third persons*** on his premises. A storekeeper may, for instance, be required to take reasonable security measures to prevent attacks or thefts against his customers. See Prosser, p. 395. Similarly, a merchant may be required to at least warn his customers where independent contractors are doing work on the premises which the merchant should know may pose danger to nearby persons.

i. **Resistance to robbery:** Suppose a merchant is confronted by a ***robber,*** who threatens to harm the customers unless the merchant hands over the cash. Does the merchant's duty of reasonable care to his customers require that he accede? A majority of the few recent cases on
★ the subject have answered ***"no".*** See, e.g., *Boyd v. Racine Currency Exchange, Inc.*, 306 N.E.2d 39 (Ill. 1973), a bank robbery case in which the plaintiff's decedent was shot to death when the teller refused to hand over the cash. The court based its denial of liability on the theory that "whether acquiescence would have spared the decedent is, at best, speculative", as well as on the notion that to allow liability might encourage the use of hostages, thereby generally increasing the risk to invitees upon business premises. (But it is hard to believe that either bank tellers or robbers are so aware of modern tort law that any decision on liability will effect the use of hostages.)

A dissent contended that the reasonableness of the teller's action, and its causal relation to P's death, were issues that should have been left to the jury.

3. **Public employees:** What is the status of a public official or employee who comes onto the property without the owner's consent? ***Firemen*** and ***policemen*** are generally held to be merely licensees, not invitees, and there is therefore no affirmative duty to make the premises safe for them. Prosser suggests that the real reason for this holding is that such persons usually come onto the property in an emergency, and it would be unreasonable to require the owner to make advance preparations for their arrival. Prosser, p. 397.

   a. **Other public figures:** Other public officers and employees, such as safety inspectors, garbage men, postmen, etc. are usually invitees. The theory behind this is that since the visits of such persons are foreseeable (at least in general, if not in the sense of anticipation of a particular visit on a particular day), the owner can reasonably be expected to keep his premises safe for them. Prosser, p. 396.

VI. REJECTION OF CATEGORIES

A. **Rejection of categories:** A number of courts in the last decade have ***rejected*** the rigid categories of trespasser, licensee, and invitee, in favor of a general single "reasonable man" standard of liability.

   ★ **Example:** P is a social guest in D's apartment. P asks to use the bathroom, and while doing so severs part of his hand on a broken faucet. It turns out that D was aware of the defective faucet, but failed to warn P. *Held*, by the California Supreme Court, henceforth the plaintiff's status as trespasser, licensee or invitee will ***not be dispositive*** as to the duty of care owed to him. Instead, the test will be "whether in the management of his property [the owner] has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

   Note: In the vast majority of jurisdictions, as noted previously, the owner has a duty to warn a licensee of known defects which the licensee may not discover. But California had never, up to the time of *Rowland*, accepted this rule. (See P,W&S, p. 516, note 1). Therefore the plaintiff in *Rowland* could not have won if the court had not rejected the invitee/licensee distinction.

1. **Several states follow California:** Several states (but by no means all of the states that have considered the issue) have followed California in rejecting the hard-and-fast categories. These include Colorado, Massachusetts, Minnnesota, Rhode Island, Hawaii and most recently, New York.

   a. **New York case:** New York did so in *Basso v. Miller*, 386 N.Y.S.2d 564 (N.Y. 1976), stating that in all owner liability cases, New York will adhere to "the single standard of reasonable care under the circumstances whereby foreseeability [of harm to visitors] shall be a measure of liability. . . . While status is no longer determinative, considerations of who plaintiff is and what his purpose is upon the land are factors which, if known, may be included in deciding what would be reasonable care under the circumstances."

2. ***Rowland* limited or rejected:** Several states have specifically refused to follow *Rowland* at all. These include Illinois, Ohio and Arizona, among others. And several other states have been willing to abolish the rigid consequences of the invitee/licensee distinction, but have continued to apply the old rules restricting liability as to ***trespassers***. See, e.g., *Wood v. Camp*, 284 So.2d 691 (Fla. 1973).

VII. LIABILITY OF LESSORS AND LESSEES

A. **Lessee:** A lessee of real estate (usually called a "tenant") becomes the possessor of the property. As such, he is treated as if he were the owner, and all the rules of owner liability discussed previously in this chapter apply to him.

1. **Liability:** This can produce liability where the non-lawyer might not expect it. For instance, an apartment tenant who inherits a dangerous condition from the landlord which the tenant has not discovered (e.g., a faulty ceiling), but which defect could have been discovered by reasonable care, may be liable to an invitee (e.g. a door-to-door salesman invited in to demonstrate his goods) if the ceiling falls. For this reason, such tenants should have liability coverage in their "homeowner's" insurance policy. (The landlord may also be liable in such a situation, as will be discussed below.)

2. **Common areas:** But the tenant is only liable for those areas as to which he is in actual possession. Thus ***common areas***, such as stairways, elevators, corridors, outside grounds, etc., are usually deemed to remain within the control of the landlord, at least where the building is a multiple dwelling, office building, or other structure with multiple tenants. The tenants therefore can have no liability for defects in these areas (except perhaps for a non-possession-related liability for failing to warn of the defect to a person to whom they had a duty of due care, such as a social guest. In this situation, the liability would be based upon general principles.)

B. **Lessor's liability:** Since the lessee is treated as the owner for most purposes, courts generally relieve the lessor of most liability once he transfers possession to the lessee. This is true both as to dangerous conditions existing prior to the lease, and conditions arising thereafter. There are, however, a number of important exceptions to this general rule of non-liability.

1. **Danger unknown to lessee which should be known to lessor:** The lessor will be liable to the lessee (and to the lessee's invitees and licensees) for any dangers existing at the start of the lease, which the lessor ***knows or should know about***, and which the lessee has no reason to know about. Rest. 2d, §358.

   a. **No duty of inspection:** This rule does not mean that the lessor is required to make an inspection of the premises. It merely means that if he either knows of a hidden danger, or knows of other facts which should reasonably lead him to learn of the danger (e.g. he knows of similar defects in other apartment units in the same building), he must warn the tenant. Rest. 2d, §358, Comment b.

b. **Natural condition:** Because the landlord's liability for concealed dangers is essentially one in deceit, there is no reason why it should not apply to ***natural*** conditions as well as to artificial ones. See Rest. 2d, §358(1). This should be contrasted with the rules discussed *supra*, p. 176, as to liability to child trespassers, where the courts have made this distinction.

2. **Rented property to be held open to public:** If the lessor has reason to believe that the lessee will ***hold the premises open to the public,*** and he also has reason to believe that this may occur before a condition which the lessor knows is dangerous has been repaired, the lessor will be liable. The reason for this rule is that where the safety of the public at large is at stake, the lessor has a higher duty than where only casual visitors are expected; the lessor should not be allowed to freely transfer this responsibility onto the lessee.

   a. **Duty of inspection:** Here, it is usually held that the lessor has an affirmative duty to inspect the premises to find and repair dangers. Prosser, p. 403.

   b. **Defect must exist prior to lease:** This rule applies only where the dangerous condition exists at the time the lessee takes possession. Thus if the premises are turned over in good condition, and due to the lessee's negligence the structure deteriorates to a dangerous point, the lessor has no liability even if he is aware of the condition. Rest. 2d, §359.

   c. **Lessee's promise to repair:** The lessor is only liable under this rule if he has reason to believe that the lessee will admit the public prior to repair of the dangerous condition. But the lessor does not automatically escape liability merely because his lease contains a promise by the lessee to make the repairs.

      i. **Express promise:** But if the lease contains an express promise by the lessee that he will ***not admit the public*** until he has made the repairs, this will generally be enough to relieve the lessor of liability. Rest. 2d, §359, Comment i.

3. **Common areas kept under control of lessor:** As noted previously, the ***common areas*** of a structure, such as its corridors, stairwells, etc., frequently remain within the landlord's control, particularly where the building has several tenants. As to such a common area, the lessor has a general duty to use reasonable care to make the area safe. If he does not do so, he will be liable not only to an injured tenant, but also to a member of the tenant's household, a social guest, a business invitee, or anyone else who uses the common area with the tenant's or landlord's permission. Rest. 2d, §360.

   a. **Natural conditions:** A majority, but not a large one, of courts hold that the landlord's duty applies even where the condition is a ***"natural"*** one, such as snow or ice on the front steps of the building. Prosser, p. 407.

4. **Lessor contracts to repair:** If the lessor ***contracts,*** as part of the lease, to keep the premises in good repair, courts are not in agreement about whether breach of this duty will give rise to a tort action. The tenant himself, of course,

can sue in contract for such a breach, but damages in such an action have sometimes been restricted to the reduction in the rental value of the premises due to the breach, and damages for personal injury not allowed. Prosser, p. 408.

a. **Restrictive rule:** Until fairly recently, most courts have ***not*** permitted an action in tort either by the tenant or anyone else; this means that a member of the tenant's family, a licensee, or anyone else not a party to the original lease would have no recovery against the landlord based on the failure to repair.

b. **Modern, but still minority, view:** A growing minority of courts, however, has recently held that the landlord's breach of his covenant to repair does give a tort claim to anyone injured. But such courts have required the plaintiff to show not only that the landlord failed to perform his contract, but that he failed to use ***reasonable care*** in performing it. See, e.g., Rest. 2d, §357(c). Thus the landlord is generally only required to correct the condition within a reasonable time after being notified of it. Prosser, p.410.

5. **Repairs negligently undertaken:** Even if the landlord has no contractual duty to make repairs, he may incur liability if he gratuitously ***begins*** to make repairs, and either performs them unreasonably, or fails to finish them. Where the landlord, by doing this, has made the danger actually ***worse,*** or has lulled the tenant into a false sense of security, most courts agree that the tenant, or anyone else injured while on the premises with the tenant's consent, may recover. Prosser, p. 411; Rest. 2d, §362. To avoid liability, however, the landlord does not necessarily have to finish the repairs, or correct them, but merely exercise reasonable care for the safety of persons on the property; a warning may be enough. Prosser, *ibid.*

a. **Condition not worsened:** But if the danger is not worsened by the landlord's negligent or abandoned repairs, the courts are divided. Prosser recommends that the landlord nonetheless be required to proceed with reasonable care, ". . . Since there will be situations in which the tenant is unable to leave the premises and is therefore endangered, even though the situation has been made no worse than it was." Prosser, p. 411.

b. **Knowledge of lessee:** Most courts have also held that the landlord is liable only where the lessee does not know that the repairs were negligent or abandoned. See Rest. 2d, §362, Comment d. That is, in the majority view the action is essentially one for "deceit" on the part of the landlord. This means that even a third person (e.g. a social guest) may lose his right to sue the landlord, where the tenant has failed to pass on his knowledge of the landlord's negligence.

★ **Example:** P is a social guest in a house rented by X from D. Water continually drips from the roof of the house onto the front steps, and D begins to fix this problem by repairing the roof. However, he does not finish the repair by installing guttering, and X is aware that the repairs have not been finished. He fails to warn P about the whole problem, and P slips on ice caused by the freezing of the run-off. *Held*, D "could reasonably assume that [X] would inform his guest about the icy condition on the front steps" and D is therefore not liable. *Borders v. Roseberry*, 532 P.2d 1366 (Kan. 1975).

c. **Repairs done by independent contractor:** Suppose the lessor hires an ***independent contractor*** to perform repairs. Is he liable for the contractor's negligence? Most courts agree that the landlord ***cannot delegate*** his responsibility for safe repair. Therefore, if the landlord would be liable for negligent repair work done personally by him, he will be equally liable for the contractor's negligence (except perhaps for "collateral negligence", i.e., negligence not arising out of risks inherent in the job itself. See *infra*, p. 244)

i. **Limitation of liability:** Some courts limit the owner's liability to situations where the control of the premises is not completely entrusted to the contractor, and would thus deny liability if, say, the repairs were done while the owner/lessor was away on vacation. But see Rest. 2d, §§ 419, 420, not providing for any such limitation. See also Prosser, pp. 411-2.

6. **Duty of protection:** Does the lessor have the duty to attempt to make the premises safe for his tenants, by the taking of ***security precautions?*** Most courts have held "no". But this attitude may be changing, as is evidenced by the following example.

★ **Example:** P is a tenant in a combination office-apartment building owned by D. At the time she became a tenant, the building had a doorman, but D thereafter ceased to furnish one. P is assaulted and robbed in the hallway of the building one night, and sues D. There is evidence that there had been an increasing number of assaults and thefts in the building. *Held*, D had a duty to use reasonable care to protect its tenants from "foreseeable criminal acts committed by third parties". D was in a much better position to take such steps than its tenants; furthermore, it had notice of the dangers. And P was led to "expect that she could rely upon" protection, since there was a doorman when she moved into the building. D is not necessarily required to maintain a doorman, if other procedures (e.g., a tenant-controlled intercom/latch system) could provide the same relative degree of security as that which P relied on. (The court analogized to the duty of innkeepers, discussed *supra*, to protect their guests against similar attacks.) *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.D.C. 1970).

7. **Persons outside the premises:** It was noted previously, *supra*, p. 171, that owners' liability for harm to persons ***outside*** of the premises is somewhat broader than that involving harm to persons on the premises. This is similarly true as to lessor's liability to such off-the-premises plaintiffs.

a. **Danger at time of lease:** The lessor is liable for unreasonably dangerous conditions that exist on the premises at the time he turns them over to the lessee (e.g. holes in the sidewalk). Prosser, p. 402.

b. **Conditions arising after lease:** Where the dangerous condition does not arise until after the start of the lease term, the lessor is usually not liable unless he has contracted with the lessee to keep the premises in repair, and has unreasonably breached the contract. See Rest. 2d, §§ 377, 378.

c. **Activities carried on by tenant:** If the tenant carries on ***activities*** that

are unreasonably dangerous to persons off the leased premises (e.g., blasting operations in a quarry), the lessor is liable only if he had reason to believe, ***at the time of the lease,*** that the activity would occur, and reason to believe that it would be dangerous to such persons. Rest. 2d, §379A.

8. **General negligence standard for lessors:** Just as some courts have now imposed a general negligence standard on owners (see *Rowland*, *supra*, p. 184), so a few courts have imposed a similar general requirement of due care upon lessors.

★ **Example:** D owns a two-story apartment building, and lives on the ground floor. Her son and daughter-in-law live on the second floor, and get to their quarters by an exterior stairway. The daughter-in-law is babysitting one day for P's four year old daughter, when the child falls off the stairway to her death. Evidence shows that the stairway was constructed in a dangerously steep way. *Held*, D had a general duty to exercise reasonable care not to subject persons on the premises to an unreasonable risk of harm. This is so even though the stairway was not retained in D's control. To relieve D of liability would leave P without a remedy, since the daugher-in-law testified that as tenant, she had no authority to alter the stairway. Furthermore, P's claim here was not that ***maintenance*** was negligent (in which case the question of who had control of the stairway might be relevant), but that construction was negligent. In this respect, D is the only one whose conduct is relevant. Verdict for plaintiff affirmed. *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973).

VIII. VENDORS AND VENDEES

A. Vendor's liability: A ***seller*** of land is usually released from tort liability even more definitively than a lessor. Once he has turned over the property, there are only a couple of situations in which he may be liable to the vendee or anyone else injured due to a defect in the property.

1. **Concealment:** The first of these situations is where the vendor has failed to disclose to his buyer a ***dangerous condition*** of which the former is or should be aware of, and which he should anticipate that the buyer will not discover. Rest. 2d, §353. This liabililty never extends past the time when the vendee actually discovers the condition and has had a reasonable time to correct it; this is so even if it is the vendee's guest, or some other third person, who is injured.

   a. **No concealment:** Furthermore, if the vendor has not "actively" concealed the danger (by hiding it or intentionally misleading the buyer into not looking for it), the liability only continues until the buyer has had "reasonable opportunity" to find the defect and correct it, whether he has in fact found it or not. Rest. 2d, §353(2).

   b. **Analogy to lessor's concealment:** This liability is closely analogous to that of a lessor who conceals a defect from his lessee (*supra*, p. 185).

2. **Builder-vendors:** Where the vendor of a house is the company that ***built it***, some courts are now applying general principles of negligence, and holding the

vendor liable for all injuries by analogy to cases involving negligence in manufactured goods. And others are imposing ***strict liability*** in this situation, again by analogy to those cases holding a manufacturer of defective goods liable without regard to negligence. The subject of builder-vendor liability is discussed further *infra*, pp. 289-90.

3. **Danger to persons outside premises:** The vendor may also be liable where a condition exists at the time of sale which thereafter harms persons outside of the premises. See Rest. 2d, §373. This might be the case, for instance, if the seller transfers a building with dangerously loose brick-work, and a brick thereafter falls off and injures a pedestrian.

DAMAGES

Introductory note: Every personal injury lawyer knows that having "good damages" in a case is as important as having "good liability". This chapter examines the various components of damages that may be recovered in a personal injury action. It also discusses damages which may be recovered by persons other than the one who is physically injured (e.g., the spouse of a person who has been killed).

I. PERSONAL INJURY DAMAGES GENERALLY

A. Actual injury required: In any action based on negligence, the existence of ***actual injury*** is a requirement. Unlike intentional tort actions (e.g. trespass), therefore, ***nominal damages*** may not be awarded. See Rest. 2d, §907, Comment a.

1. **Physical injury required:** Furthermore, in the usual negligence case, the plaintiff must show that he suffered some kind of ***physical*** harm. We have already seen (*supra*, p. 164), for instance, that the plaintiff may not recover where he has sustained only mental harm, with no physical symptoms.

2. **Elements of damages:** But once physical harm has been proven, a variety of damages may be recovered by the injured plaintiff. In addition to compensation for the physical harm itself (e.g., $100,000 for the loss of a leg), the important general categories of damages are as follows:

   a. **Economic Loss:** The plaintiff can recover his direct ***out-of-pocket losses*** stemming from the injury. These include ***medical expenses, lost earnings,*** and the cost of any labor required to do things that plaintiff can no longer do himself (e.g. a housekeeper).

   b. **Physical pain:** The plaintiff may also recover for actual ***physical pain*** suffered from the injuries. (As discussed below, this aspect of damages, like the others, may include both suffering sustained up to the time of the trial as well as an estimate of the suffering which will occur during the future.)

   c. **Mental distress:** Finally, the plaintiff may recover for various mental consequences of the injury, including:

      i. ***fright and shock*** at the time of the injury;

      ii. ***humiliation*** due to disfigurement, disability, etc.;

      iii. unhappiness and depression at being ***unable to lead one's previous life*** (e.g. inability to enjoy sex, work, play sports, etc.);

      iv. ***anxiety*** about the future (e.g. anxiety about the plaintiff's unborn child).

   d. **Blurred categories:** Observe that the various categories blend together. For instance, compensation for the physical injury itself (e.g. loss of a leg) is practically indistinguishable from compensation for mental distress due to

the loss, and may be closely related to physical pain suffered as a result of having a stump. However, the precise allocation of the damages is generally of little importance, since the jury is usually required to give a single figure representing combined damages.

3. **Maximum possible verdict:** One situation in which allocation of the injuries to the various categories becomes significant is when the court attempts to decide whether the jury's verdict is so unreasonable that it must be set aside as a matter of law (either for being too high or too low). Most of the time, the issue is whether the verdict is too high, and the judge decides this question by evaluating the ***"maximum possible reasonable award",*** on an item-by-item basis.

★ a. **Item-by-item evaluation:** Thus in *Anderson v. Sears, Roebuck & Co.*, 377 F.Supp. 136 (E.D.La. 1974), the plaintiff was a young child badly burned in a fire caused by a heater manufactured by defendant. The court calculated maximum damages for "past physical and mental pain", "future physical and mental pain", "future medical expenses", "loss of earning capacity" and "permanent disability and disfigurement". The court found that the maximum reasonable recovery would have been $2,987,000, and that therefore the jury's actual award of $2,000,000 was reasonable. (The case makes no mention of damages for past medical expenses, which would ordinarily be an item of recovery.)

B. Recovery for future damages: The rules of civil procedure require that a plaintiff bring only ***one action*** for a particular accident, and that he recover in that accident for not only his past damages, but for ones he can be expected to ***sustain in the future.*** Rest. 2d, §10.

1. **Absolute certainty not required:** Obviously future losses cannot be exactly calculated. All the plaintiff has to do, however, is to show the ***approximate*** amount of damages, which, ***more likely than not,*** he will sustain in the future. Such future damages can include future pain and suffering, future mental distress, future lost earnings, future medical expenses, etc.

2. **Expert testimony:** To prove his future damages, the plaintiff will usually use various kinds of expert testimony. First, he will try to show that the physical injuries will probably be permanent, or at least long-lasting; expert medical testimony would be relevant on this point. Then, he will try to show facts about what his future prospects would have been had there been no injury. He may use ***actuarial tables*** to show, for instance, that he has a life expectancy of, say, thirty-five years (assuming that his life expectancy is not shortened by the injuries), and that he must therefore be compensated for thirty-five years of anticipated pain and suffering.

a. **Cost income:** Also, if the plaintiff is no longer able to work, he may produce an expert in economics to testify about what his income from working would have been. See, e.g., *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1976), in which the plaintiff used a professor of labor economics to testify that the plaintiff's decedent, a railroad worker, would probably have

increased his earnings by an 8% compounded annual rate over the next thirty-four years, and would have spent 70% of these earnings on his family (who were the plaintiffs in the action, which was one for wrongful death — see *infra*, p. 200). As in *Burlington*, courts generally allow plaintiff's counsel considerable freedom in introducing such expert testimony.

b. **Shortened life expectancy:** In many states, the plaintiff may also show that his ***life expectancy*** has been shortened. This will entitle him to recover for the anticipated "value" of these lost years, as well as for the lost income that could have been earned during them.

3. **Present value:** Future damages are, by definition, compensation for losses which the plaintiff will not suffer until some time in the future. The plaintiff is therefore getting, in a sense, a windfall by collecting now for future losses. To offset this windfall, courts generally instruct the jury to award the plaintiff only the ***"present value"*** of these losses, at least where lost future earnings and future medical expenses are concerned (though not in the case of damages for physical impairment, pain and suffering, or mental distress). The effect of this discounting is that the defendant receives "interest" on his advance payment. See Rest. 2d, §913A.

Example: Suppose that the jury concludes that P has a life expectancy of twenty-five years, and that he will have anticipated medical expenses during the rest of his life of about $10,000 per year. The jury will be instructed not to award the annual amount times the number of years (i.e. $250,000), but rather, the present value of a $10,000 payment in each of the next twenty-five years. The defendant would be permitted to introduce statistical tables showing that, assuming an interest rate of, say, 6%, the present value of a stream of twenty-five annual payments is only $127,833, not $250,000.

4. **Effect of inflation:** When the jury calculates the plaintiff's anticipated lost earnings or anticipated medical expenses, it is not always allowed to consider the effect that ***inflation*** would have on these sums. Where this is the case, some courts have similarly refused to require that the award be discounted to present value, on the assumption that inflation and discounting cancel each other out. See, e.g., *Beaulieu v. Elliott*, 434 P.2d 665 (Ala. 1967).

a. **Inflation and discounting allowed:** But if discounting is required, the plaintiff will usually be allowed to show that inflation would have increased his present salary regularly over the future, and is likely to do the same to his anticipated medical expenses. See, e.g., *Burlington Northern, Inc. v. Boxberger, supra,* approving plaintiff's expert's testimony that plaintiff's decedent, earning $18,000 annually at the time of his death, would have been earning $40,000 per year thirty-four years later, because of inflation.

5. ***Per-diem* calculation:** How is the jury to go about fixing a value for pain and suffering, particularly pain and suffering which is prospective in nature? In an effort to give the jury guidance (and to increase the resulting figure), plaintiffs' lawyers often attempt to use what is called the ***per-diem*** argument. That is, the lawyer suggests to the jury that a particular amount for each day, hour or minute

of suffering (e.g. $2.00 per hour) would be fair. The lawyer then multiples out this figure by the number of days or hours of anticipated suffering (usually the plaintiff's life expectancy) and he emerges with a very precise, and large, figure. (For instance, $2.00 per hour, based on a twenty-four hour day, amounts to $525,600 if the plaintiff has a thirty year life-expectancy!)

a. **Majority rule allows *per-diem* argument:** Most courts allow the ***per-diem*** argument, "considering that juries will have intelligence enough not to be misled, and that in any case it is open to the defendant to anticipate and counteract the argument." P,W&S, p. 543. But a substantial minority refuse to allow *per diem* calculations. See, e.g., *Duguay v. Gelinas*, 182 A. 2d 451 (N.H. 1962), holding that the *per-diem* method is "an attempt by counsel to distort and exaggerate the measurement of what is immeasurable by such a mathematical method".

C. **Effect of taxation:** A special section of the Internal Revenue Code, §104, makes any recovery or settlement for personal injuries ***tax-free***. This is true even if the damages represent lost past or future earnings (which, of course, would have been taxed). This exemption has given rise to two related questions, on which the courts have been in dispute.

1. **Calculation based on net, not gross, earnings:** First, should the jury be instructed to base its award for lost past and future earnings on what the net, ***after-tax,*** amount of these earnings would have been?

a. **Ordinary taxpayer's future earnings:** Most courts hold that in the case of a taxpayer in the lower or middle income brackets, lost future earnings should be calculated on a gross, not after-tax, basis. These courts point to the uncertain future course of federal taxation, and to other factors in the personal injury litigation system (e.g., the fact that plaintiffs must pay their lawyers out of the award) as reasons for not worrying about this relatively minor windfall.

i. **Past earnings:** But where the plaintiff seeks ***past*** lost earnings, the amount of tax which would have been paid on these earnings can be calculated with some precision. Therefore, many courts require the jury to award only the after-tax lost earnings.

ii. **High-bracket taxpayers' future earnings:** Similarly, where the plaintiff is or would have been a high-bracket taxpayer, so that the windfall of awarding him gross future earnings is greater than in the low or middle income case, many courts have required the jury to award after-tax income. Thus in *Burlington Northern, Inc. v. Boxberger*, *supra*, the Ninth Circuit Court of Appeals held that after-tax future earnings must be awarded where the lost income was in the $18,000 to $40,000 range (over a thirty-four year span starting in the early 1970's), on the grounds that "the impact of income taxes has a significant and substantial effect in the computation of probable future contributions [to the decedent's family] and may not be ignored."

iii. **Restatement view:** The Second Restatement, in §914A, provides that future earnings of ordinary taxpayers should not be calculated on an after-tax basis, but has a caveat expressing no opinion as to whether past earnings, and future earnings of high-bracket taxpayers, should be so calculated.

2. **Telling the jury about non-taxation of the award:** The second question is whether the ***jury should be told*** that any award would not be taxable. Proponents of telling the jury are afraid that otherwise, the jury will assume that the award would be taxable, and will award a larger sum so that the plaintiff will come out with a "fair amount" after subtraction of the imaginary tax.

   a. **General rule:** Courts are split on what, if anything, should be said to the jury. But it seems fair to say that most appellate courts at least permit the trial judge to tell the jury that the award would not be taxable. Some appellate courts even hold that it is reversible error not to tell the jury about this; see, e.g., *Burlington Northern v. Boxberger*, *supra*.

D. **Reimbursement by third persons:** As we have seen, the plaintiff is entitled to recover his out-of-pocket expenses, including expenditures for medical care, lost wages, etc. This is so even though the plaintiff is ***reimbursed*** for these loses by some ***third party*** (e.g. health insurance). The general rule is that as long as payment for any aspect of harm is not made by the defendant or someone acting on his behalf (e.g. the defendant's insurance company), the plaintiff's recovery from the defendant is not diminished by the amount of these payments. See Rest. 2d, §920A.

1. **Collateral source rule:** This principle is commonly called the "***collateral source rule***". It applies in the following common situations, among others:

   a. **Employment benefits:** If the plaintiff misses work, he can recover the wages he would have earned, even if these are reimbursed through ***sick pay*** furnished by the employer (either voluntarily or under a contract or collective bargaining agreement), statutory disability benefits (e.g. workman's compensation), etc.

   b. **Insurance:** Any losses covered by the plaintiff's insurance may nonetheless be recovered.

   c. **Social security and welfare payments:** Payments by the government under social welfare programs (e.g. social security disability benefits, welfare payments, etc.) also do not count against the plaintiff's recovery.

   d. **Free services:** And even more surprisingly, if the plaintiff receives ***free services*** (e.g. free medical services from a friend, or free home-care services by his own family), the plaintiff may recover the ***reasonable value*** of these services.

2. **Rationale:** There are three major rationales for the collateral source rule.

   a. **Payment by plaintiff:** First, many of the kinds of benefits listed above are ones for which the plaintiff has indirectly paid. For instance, if he receives payments under a disability or life insurance policy, he has paid the

premiums on these policies previously; similarly, if he receives free care from his family, he has contributed to the support of his family. It would be unfair to strip him of the benefits of his investment.

b. **Aiding wrongdoer:** Second, courts feel that it is unfair to allow benefits received by the plaintiff (whether he indirectly paid for them or not) to go to the benefit of the tortfeasor, who is obviously the more culpable of the two.

c. **Subrogation:** Finally, in many cases the person making the payments is ***subrogated*** to the rights of the plaintiff, or has a right of reimbursement against him out of any judgment; in this situation, there is no double recovery at all.

★ **Example:** P's medical expenses, sustained as a result of D's negligence, are paid in part by a medical insurance plan. The plan requires that P reimburse it out of any judgment he receives, up to the amount of the benefits. *Held*, the collateral source rule is proper, and P's damages against D should not be reduced by the amount of the health insurance benefits. First, reimbursement to the plan obviously prevents this from being double recovery. Furthermore, even without reimbursement, plaintiff would not really be receiving double recovery, since he will have to pay his lawyer out of any recovery. *Helfend v. Southern California Rapid Transit Dist.*, 465 P.2d 61 (Cal. 1970).

E. Mitigation: A tort plaintiff, like a contract plaintiff, may not recover any damages which he could reasonably have avoided. This idea is sometimes expressed by saying that the plaintiff has a "***duty to mitigate***". In particular, this means that the plaintiff cannot recover for any harm which would probably have been avoided had he sought ***adequate medical care***.

1. **Only reasonable care required:** But the plaintiff is only required to use reasonable effort and care, and courts are very lenient in construing this. Furthermore, the burden of proof is on the defendant to show that the plaintiff's harm could reasonably have been avoided.

★ **Example:** P suffers a torn cartilage in her knee as result of a car accident caused by D. P does not undergo an operation. At the trial, D presents testimony from a physician that had P undergone such an operation, she "should recover completely." *Held*, on appeal, D was not entitled to a ruling as a matter of law that P had acted unreasonably. To obtain such a ruling, D would have had to introduce evidence as to the risks involved, the probability of success, the expenditure of money necessary, and perhaps even the amount of pain which would be incurred. (The appeals court also affirmed P's recovery of damages stemming from the fact that the knee injury would interfere with P's work as a substitute teacher who sometimes engaged in strenuous physical education activities.) *Zimmerman v. Ausland*, 513 P.2d 1167 (Ore. 1973).

2. **Seat-belt defense:** Most states apply the "duty to mitigate" rule only to conduct by the plaintiff after the accident. But a few apply it also to some ***safety***

precautions which the plaintiff should have taken before the accident. In these states, for instance, it may be held that where the plaintiff has failed to wear a ***safety belt*** or ***motorcycle helmet,*** injuries which he suffers that would not have been sustained had he taken such precautions are avoidable damages, for which there can be no recovery. See Nutshell, pp. 364-5. (In other jurisdictions, the failure to use a seat-belt can be contributory negligence — see *infra*, p. 208.)

F. Pain and suffering of infant: As noted, a personal injury plaintiff may recover for pain and suffering sustained as part of his injury. Where the plaintiff is a ***very young child,*** defendants have frequently argued that pain and suffering is impossible to prove, and must be denied as a matter of law. This argument has usually lost, however.

> **Example:** P, a newborn infant, contracts salmonellosis due to the negligence of the employees of D hospital. P's mother testifies at trial that P screamed during her attacks of the disease; P's doctor also testifies that P suffered from shock, cramps, dehydration, and severe diarrhea. *Held*, such third-party evidence is sufficient to establish P's pain and suffering, even though she herself could not testify. Furthermore, "even in the absence of any explicit evidence showing pain, the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain." *Capelouto v. Kaiser Foundation Hospitals*, 500 P.2d 880 (Cal. 1972).

1. **Parents' cause of action for suffering:** In *Capelouto*, P's parents also tried to recover for their own mental distress at seeing their daughter suffer; this claim was rejected by the jury. The appeals court noted that even under *Dillon v. Legg*, (*supra*, p. 167), the parents could recover for witnessing this suffering only if they suffered some ***physical*** symptoms themselves; the court held that the record disclosed no such physical harm.

II. PUNITIVE DAMAGES

A. Punitive damages: Punitive damages (as noted *supra*, p. 8) are sometimes awarded to penalize the defendant, and deter similar wrongdoers, where the defendant's conduct is particularly outrageous.

1. **Negligence cases:** In cases of negligence, as opposed to intentional torts, punitive damages are usually awarded only where the defendant's conduct was
★ "reckless" or "willful and wanton". See, however, *Sebastian v. Wood*, 66 N.W. 841 (Iowa 1954) allowing punitive damages against a drunk driver, but rejecting the requirement that the defendant have acted with "malice".

2. **Insurability:** Are punitive damages covered by an ordinary liability policy? Many such policies explicitly exclude punitive damages. Where the policy does appear to cover such damages, however, the courts are split. About half disallow such coverage, on the grounds that it is against public policy, and defeats the whole idea of punitive damages (i.e. to punish the wrongdoer and deter future

★ wrongdoers). But other courts have allowed coverage; see, e.g., *Price v. Hartford Accident and Indemnity Co.*, 502 P.2d 522 (Ariz. 1972), relying partly on the argument that "an insurance company which admittedly took a premium for covering ***all*** liability for damages should honor its obligation." The court also pointed out that the defendant would nonetheless be punished, by having his premiums rise or his coverage cancelled.

3. **Punitive damages against corporation:** A corporation, like any employer, is generally liable for the torts of its employees acting within the scope of their employment (see *infra*, p. 238). Where an employee commits a tort of a nature which would permit punitive damages to be awarded against him, may such damages be awarded against the ***employer?*** Again, the courts are split. Many follow a "middle" ground, expressed by Rest. 2d, §909. That section allows punitive damages against an employer only where the employer had some personal culpability (either by authorizing the act, recklessly hiring the worker despite his unfitness, or approving the act after the fact) or where the worker was employed in a ***managerial capacity.***

4. **Recent tendency to large punitive damages:** In recent years, juries have often show a tendency to award large punitive damages, particularly in products liability cases. For instance, in a recent unreported California case against Ford motor company for injuries sustained when a Pinto fuel tank caught fire, a jury awarded more than $100,000,000 in punitive damages. One juror later explained that this was an attempt to make Ford pay out in one fell swoop all the money it had saved by skimping on safety in its fuel tank design. The award was later substantially reduced by the trial judge.

   a. **Effect of possible multiple suits:** Observe that in a case like this, if every jury hearing a case against Ford based on faulty gas tank design of the Pinto were to award a similar sum, Ford's liability might be enormous, even to the point of threatening the company's ability to pay simple compensatory damages to subsequent plaintiffs. Judge Friendly discussed this danger in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), a case involving the allegation that the defendant recklessly placed an unsafe drug on the market.

III. RECOVERY BY SPOUSE OR CHILDREN OF INJURED PARTY

A. **Historical action for husband:** The old English common law viewed the husband-wife relationship as a master-servant one. Accoringly, if anyone injured the wife, the husband had a claim for "loss of services". These lost services might include companionship, sex, housework, earnings outside the home, etc.

1. **No remedy for wife:** But the wife, being essentially a chattel, had no right to "services" from her husband. Therefore, if he was injured, she could not recover anything at common law; all recovery had to be in his name.

2. **Modern view:** Starting in the late nineteenth century, so-called "Married

Women's Acts" were passed in most states giving the wife legal rights on her own. Most of these acts have been interpreted to give the woman a right to recover for ***loss of affection, companionship, sex,*** etc. due to her husband's injury. And despite the pasage of these Acts, men are still generally allowed to recover for injuries to their wives, although earnings the wife would have had outside the home must generally be recovered by her in her own action. Prosser, p. 891.

a. **Double recovery:** Where the physically injured party and his or her spouse are both allowed to sue, there is obviously a danger of double recovery. For instance, where it is the woman who is injured, she might recover her medical expenses in one action, and her husband might recover these same expenses in his own action, on the theory that he was really the one paying for them. For this reason, the civil procedure rules of a number of states require that the two actions be brought together, so that double recovery can be guarded against; even where no rules require this, as a practical matter both actions are almost always brought jointly. See Nutshell, p. 369.

3. **Parent's recovery where the child is injured:** Similarly, nearly all jurisdictions allow a ***parent*** to recover ***medical expenses*** incurred due to an injury to the child. Also, since the common law rule that a parent is entitled to the ***services and earnings*** of his minor child has never been repudiated, a parent can recover for loss of these items.

a. **Loss of companionship:** But only a few courts allow a parent to recover, in addition to the above items, damages for loss of the child's companionship or affection. (This is so not only where the child has been injured, but also where he has been killed — see the discussion of wrongful death actions, *infra*, p. 199).

4. **Child's action where parent injured:** Where it is the ***parent*** who has been injured, virtually no courts allow the child to recover for loss of companionship or guidance. Thus, in *Russell v. Salem Transportation Co.*, 295 A.2d 862 (N.J. 1972), the court refused to allow minor children whose mother had been severely injured to recover anything, on the grounds that allowing recovery "would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award . . . Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in terms of the total cost of such awards to the injured community as a whole." The court contended that allowing the other spouse an action for loss of companionship, etc., was generally sufficient compensation. (However, in *Russell* itself, the husband was killed in the same accident, thus foreclosing his ability to maintain such an action, since he suffered no loss of companionship.)

a. **Prosser's view:** Prosser (p. 896) condemns the denial of recovery to a child in this situation, stating that it fails to protect the interest of the child in "proper parental care", and that this interest is at least as compelling as that of a husband or wife in the companionship of his or her spouse.

5. **Defenses:** In such third-party actions, it is usually held that any defense which could have been asserted in a suit by the injured party may be asserted against the plaintiff. For instance, in a suit by a husband for loss of companionship and intercourse due to injuries to his wife, the defendant may assert that the wife was contributorily negligent. See Prosser, p. 892.

   a. **Defenses against plaintiff:** Furthermore, there are defenses that can be asserted against the plaintiff himself. For instance, if Husband and Wife are driving together, and Wife is injured in a collision, the defendant to Husband's suit for loss of services can win by showing that Husband drove negligently. Prosser, pp. 893-4.

IV. WRONGFUL DEATH AND SURVIVOR ACTIONS

A. Consequences of injured party's death: At common law, when a person who was physically injured by the defendant's negligence died from these injuries, his death had two important consequences with respect to legal recovery. First, the decedent's own tort action was extinguished. Second, third persons injured by his death (e.g., his spouse and children), lost their right to recover, due to an early illogical holding that "in a civil court the death of a human being could not be complained of as an injury". *Baker v. Bolton*, 170 Eng. Rep. 1033 (Eng. 1808).

1. **Modern statutes:** Modern statutes have been enacted, however, both in England and America, to change each of these two results. To prevent the injured party's own action from being lost due to his death, all states have enacted what are called "Survival" statutes. And to give a cause of action to the spouse and children of the decedent, "Wrongful Death" statutes have been passed.

2. **Common-law modification:** Occasionally, also, courts have supplemented the statutory process by granting common-law relief. For instance, in *Moragne v.* ★ *States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Supreme Court held that the heirs of a seaman killed on board ship could recover for his wrongful death, notwithstanding the lack of a statute, and despite prior case law holding that he could not. The Court noted that in recent years, every state had enacted a wrongful death statute, and that whatever public policy reasons were originally perceived to make such recovery undesirable no longer existed. (The Court left for future cases the issue of exactly which beneficiaries should be entitled to recover.)

B. Survival statutes: Every state has passed a ***survival statute*** to modify the common law rule in at least some respects. In about half of them, the decedent's claim for ***personal injuries*** survives, whether or not the injury was caused by the defendant. Prosser, p. 900. (The other statutes sometimes allow continuation only of those actions for injuries which did not lead to death, or for damage to personal or real property, or based upon similar distinctions.)

1. **No claim for death itself:** In many states, survival actions are acompanied by a separate wrongful death action. Where this is so, there is obviously a danger of

double recovery. For this reason, where there are two statutes the survival action generally is restricted to recovery for ***pain and suffering*** by the decedent prior to his death, lost earnings prior to death, actual medical expenses, etc. (i.e., only ★ losses occurring prior to the death). See, e.g., *Murphy v. Martin Oil Co.*, 308 N.E.2d 583 (Ill. 1974), allowing suit under the Illinois Survival Statute for the decedent's lost wages, damaged clothing, and pain and suffering, all prior to a death caused by the defendant. This means that if death is ***instantaneous,*** generally there is no survival action at all in such states, since all damages are sustained on account of or after the death. See Rest. 2d, §926, Comment a.

2. **Survival of action against dead defendant:** Most survival statutes, regardless of what torts they apply to, hold that just as the plaintiff's action may be maintained after his death, so an action may be maintained after the ***defendant*** has died, or even instituted after his death. Rest. 2d, §926.

C. **Wrongful death statutes:** As noted, most states have special ***wrongful death statutes*** which allow a defined group of persons (usually the decedent's spouse and children, and sometimes his parents if he has no wife or children) to recover for the loss they sustained by virtue of the decedent's death. Normally, the decedent's executor or administrator brings the action, but the proceeds go directly to the beneficiaries, with each one generally receiving what the court finds as being his own pecuniary loss from the decedent's death.

1. **Who are proper parties:** Since the wrongful death action is usually considered to be exclusively a statutory one, courts have been strict in construing all aspects of the statute, including the class of allowable beneficiaries. Thus it has been held, for instance, that a ***step-child*** is not an "heir" of the decedent and is thus not permitted to recover anything, even though the child may have suffered ★ tangible losses of economic support and moral guidance from the death. *Steed v. Imperial Airlines*, 524 P.2d 801 (Cal. 1974).

   a. **Illegitimacy:** Similarly, the Louisiana wrongful death statute was held to preclude recovery by an illegitimate child for her mother's death, until the statute was held to be a denial of equal protection by the Supreme Court in ★ *Levy v. Louisiana*, 391 U.S. 68 (1968). (An equal protection argument was rejected by the *Steed* court, on the grounds that *Levy* involved discrimination between children born to the same mother, a less reasonable categorization than the California scheme which merely discriminated between natural and step children.)

2. **Elements of damages:** Elements of damages in a wrongful death action are generally similar to those allowed in actions by a spouse or parent for injuries not leading to death (*supra*, p. 191). Thus, the beneficiaries may recover for the ***economic support*** they would have received had the accident, and death, not occurred, or for the pecuniary value of ***household services*** which the decedent performed.

   a. **Recovery for grief:** It is usually held that recovery under these wrongful death statutes can be had only for items having a "pecuniary value". In recent years, this has been extended so that it usually includes the

companionship, sexual intercourse, and ***moral guidance*** of the decedent. Prosser, p. 908. But virtually all courts have refused to allow damages for the ***grief*** or other mental suffering of the survivors, on the grounds that these are not by any stretch of the imagination pecuniary losses. (*Ibid*).

b. Recovery by parent where child is dead: Where a ***child*** has been fatally injured, it is hard to establish true pecuniary loss on the part of the parents, since the cost of raising and educating a child is generally more than any earnings he could be expected to bring home. However, many, if not most courts, are now willing to allow a substantial award for loss of the "companionship" of the child.

★ **Example:** Three minor children of the Ps are killed in a car accident, due to the negligence of the Ds. The trial judge tells the jury that only actual pecuniary loss from the deaths (i.e., the amount that the children could have reasonably been expected to give their parents) may be awarded, apart from medical and funeral expenses. *Held*, on appeal, award may also be made for the loss of "society, comfort and companionship" of the children. Otherwise, the result would be that most children would have, in the eyes of the law, a negative value (since the cost of raising them is more than they can be expected to give back), and tort law would not be fulfilling its job of compensation. Furthermore, it is well accepted that loss of a spouse may be compensated for by damages for loss of society, comfort and companionship; there is no reason not to do the same for loss of a child. *Selders v. Armentrout*, 207 N.W.2d 686 (Neb. 1973).

A dissent contended that wrongful death recovery was a statutory creation (the statute referring to "total pecuniary loss") and that the statute should not be amended by judicial fiat. Furthermore, said the dissent, the majority's rule would result in excessive verdicts, because of the boundless sympathy of juries.

i. Post-majority support: Other courts have held, along similar lines, that since damages may be recovered based on what the beneficiary reasonably ***expected*** to receive from the decedent, not what the decedent was legally bound to provide, support which the decedent child would have given to his parents in their ***old age*** (after his own emancipation) may be considered. Prosser, p. 909.

3. Mention of spouse's remarriage: Where it is the surviving spouse who is seeking recovery, a jury's verdict may very well be lower if the jury learns that the spouse has ***remarried.*** (This is true even though there is virtually never any legal support for such a diminution — the spouse is entitled to compensation for the loss, regardless of whether a new mate comes along and supplies earnings or companionship.) If remarriage has occurred, may ***the jury be told*** of this fact? Defendants, of course, are always seeking to do so; they often rationalize such an attempt on the grounds that prosective jurors who are acquainted with the new spouse must be weeded out for possible prejudice.

a. General rule: Most courts refuse to allow evidence of remarriage even for

this purpose; see P,W&S, p. 582. But see *Watson v. Fischbach*, 301 N.E.2d 303 (Ill. 1973), holding that limited use of the fact of remarriage during the voir dire is permissible.

4. **Defenses that could have been asserted against decedent:** There is a lot of dispute about what ***defenses*** a defendant may assert in a wrongful death action. It is generally agreed that the defendant may assert any defense which he would have been able to use against the ***decedent,*** if the decedent was still alive and suing in his own name. Thus the decedent's ***contributory negligence*** (assuming that defense is applicable in the jurisdiction in question), ***assumption of risk***, ***consent***, etc., will all bar an action for wrongful death by the survivors. Prosser, p. 910-1.

   a. **Intra-family immunity:** Where one family member negligently kills the other, will ***intra-family immunity*** prevent the children from being the beneficiaries of a wrongful death action? Most courts say "yes", but Prosser criticizes this result, on the grounds that the reason for the immunity disappears once the family relationship between decedent and defendant is destroyed by the former's death. Prosser, p. 911.

   b. **Statute of limitations:** If the decedent originally had a cause of action, but did not sue while alive until the statute of limitations on this action had run, most courts hold that the wrongful death action is ***not necessarily barred.*** These courts take the view that the wrongful death action begins to run only from the date of death (and that the applicable statute of limitations on wrongful death actions is the only thing that matters). Prosser, p. 912.

   c. **Settlement by or judgment for or against decedent:** Suppose the injured person brings his own action, and settles it, wins it, or loses it before dying. Will any of these things bar the beneficiaries from bringing a wrongful death action? Most courts have held that each of these things will bar the action, on the theory that settlement or judgment dissolves the decedent's claim, and any wrongful death action must "derive" from a live claim on the part of the decedent.

5. **Defenses against beneficiaries:** A second cluster of issues relates to defenses that may be asserted against the ***beneficiaries***.

   a. **Effect on individual claims:** Most wrongful death statutes are for the benefit of a defined class of beneficiaries (rather than for the estate itself). Where such a statute is involved, it is usually held that a defense that would be valid against a particular beneficiary (e.g. that beneficiary's contributory negligence, assumption of risk, etc.) bars recovery of the pencuniary loss that that person has suffered. If there is only one beneficiary, against whom there is a defense, this obviously forcloses the action. If there are several beneficiaries, and only some are subject to such a defense, the majority rule now seems to be that their damages may not be recovered as part of the overall wrongful death award, but that the other beneficiaries may recover for their own pecuniary losses. See Prosser, pp. 914-5.

D. Variety of statutes: Most of the above discussion of survival and wrongful death statutes has focused upon the usual statutory scheme, in which there is both a survival action and a wrongful death action (with actual losses incurred prior to death allocated to the survival action, and all other losses allocated to the wrongful death one). But there are many other statutory schemes in the various states.

1. **No survival action allowed:** For instance, some states do not allow a survival action at all where the defendant is the cause of the death; instead, the wrongful death action includes recovery for any lost earnings due to shortening of the decedent's life expectancy (without regard to whether these earnings would have been passed on to the decedent's heirs). See Rest. 2d, §925, Comment b(3).

2. **Examine particular statute:** Thus it is extremely important to examine the particular statutory set-up in the state in question.

DEFENSES IN NEGLIGENCE ACTIONS

I. CONTRIBUTORY NEGLIGENCE

A. Nature of contributory negligence defense: The contributory negligence defense is much loved by defendants, particularly insurance companies, who fondly refer to it as "contrib". The essence of the defense is that a plaintiff who is negligent (in the sense of not taking reasonable care to protect his own safety), and whose negligence contributes proximately to his injuries, is ***totally barred from recovery***. The defense is thus a complete one — it shifts the loss totally from the defendant to the plaintiff, even if the plaintiff's departure from reasonable care was much less marked than that of the defendant. Rest. 2d, §467.

B. Historical emergence: The defense is of judge-made origin. It first appeared in ★ *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). In *Butterfield*, the defendant had blocked part of a road with a pole; the plaintiff, riding his horse rapidly at twilight, ran into the pole. The court held that plaintiff was barred from recovery, since had he been riding at a reasonable speed and looking out with reasonable care, he would have seen the obstruction and avoided it.

1. **Bases for rule:** A number of justifications are frequently given for the rule. These include the argument that the plaintiff should be denied recovery to punish him, that courts will not aid one with "unclean hands", and that the defense deters plaintiffs from being negligent (on the theory that the plaintiff will be less likely to be negligent about his own safety if he knows that he cannot recover for injuries).

   a. **Not convincing:** None of these arguments is particularly convincing. The latter is perhaps least convincing of all, since, first, it is highly unlikely that plaintiffs ever base their degree of care upon a theoretical tort recovery, and second, if they did, then defendants would likewise increase their negligence in the expectation that the plaintiff might be barred by his own negligence. See P,W&S, pp. 591-2.

2. **Proximate cause rationale:** But the most common rationale supporting the contributory negligence defense is that where the plaintiff's negligence has contributed to his injuries, it has become the ***proximate cause*** of those injuries, and the defendant's conduct is no longer a proximate cause. However, this theory is not at all in accord with the general rules of proximate cause we examined previously, insofar as those general rules often allow for several distinct proximate causes of a single result.

   Example: Suppose D1, a driver, and his passenger, P, are injured in a collision with D2. If both cars were driven negligently, the proximate cause explanation of the contributory negligence defense would be that D1 could not recover against D2 because his own negligence was the superseding

and proximate cause of his injuries. Yet clearly P could recover for his own injuries against both D1 and D2, since they would be joint tortfeasors, each of whom would be the proximate cause of P's injuries. It obviously makes no sense to say that D1's negligence is the sole proximate cause of his own injuries, but only one of two proximate causes of P's injuries.

3. **Practical explanation:** The best explanation seems to be that at the time the defense evolved, courts were afraid that juries left with a free hand would give unduly large awards, and would impair the growth of industry. An additional factor is that in a comparative negligence system (the major alternative to contributory negligence, by which the plaintiff's recovery is reduced by the relative extent of his own negligence compared with that of the defendant — see *infra*, p. 214), it is necessary apportion damages between two sources, a process whose complexity scared nineteenth century courts.

C. Burden of pleading and proof: In most states, the defendant must ***specifically plead*** contributory negligence as a defense. Furthermore, he must bear the ***burden of proof*** on it; thus if there is no evidence at all (or evenly weighted evidence on both sides) as to the existence of contributory negligence, the defense does not apply. Prosser, p. 416.

D. Standard of care: The plaintiff is held to essentially the ***same standard of care*** as the defendant, i.e., the care of a "reasonable man under like circumstances". Rest. 2d, §464. However, the care a reasonable man will exercise to protect his own safety may in some circumstances be ***less*** than he will use to protect others. For instance, the Restatement suggests that a motorist driving with a passenger, if he allows himself to be distracted by a call from a friend on the sidewalk, may be negligent as to his passenger, but not contributorily negligent with respect to his own safety. Rest. 2d, §464, Illustration 2. But in the vast majority of circumstances, it is probably the case that conduct that is not reasonably careful of one's own safety would also be negligent towards others as to whom the peril is the same, and vice versa. (Rest. 2d, §464, Comment f.)

1. **Child plaintiffs:** Where the plaintiff is a ***child,*** the standard of care to which he is held is that of a reasonable child with similar age, intelligence and experience. This is, in essence, the same "subjective" standard as is applied where the child is a defendant. (See *supra*, p. 82).

2. **Insane or mentally deficient plaintiffs:** Where the defendant is an ***insane*** or ***mentally deficient*** adult, we saw (*supra*, p. 81) that courts are split as to whether he should be held to the standard of care of the ordinary reasonable adult. Where such a person is a ***plaintiff,*** courts have generally been somewhat more willing to judge him by a subjective standard (i.e. one taking into account his shortcomings); they have probably done so out of a general sense that where he has hurt only himself, he should be judged less harshly.

3. **Issue left to jury:** In any event, the issue of what constitutes reasonable care on the part of the plaintiff is left to the jury in all but a very few cases.

   ★ **Example:** P is a passenger in a car driven by D1. The car has a flat and D1

leaves it in the right-hand lane of an expressway, after dark, with no lights on. He tells P to wait on the left-hand side of the car (where the trafftic is moving) and to wave the traffic away from the car. While P is doing so, he is struck by a car driven by D2, and killed. A lower court holds that P's conduct was so dangerous that, as a matter of law, it constitutes contributory negligence. *Held*, on appeal, this was not contributory negligence as a matter of law, and the question should have been left to the jury. Given that the car was unlighted, and that D1 had not given P the flashlight that was in the glove compartment, probably none of the alternatives (e.g., standing behind or in front of the car) was materially safer to P. Also, a less strict standard should be applied where it is the plaintiff's carelessness towards his own safety that is in question. *Rossman v. La Grega*, 270 N.E.2d 313 (N.Y. 1971).

E. Proximate cause: The contributory negligence defense only applies where the plaintiff's negligence ***contributes proximately*** to his injuries. In general, the rules for determining actual and proximate causation are the same as those discussed previously in the context of defendants' conduct. (See *supra*, p. 117).

1. **Actual causation:** Thus the plaintiff's negligence must, for one thing, be a "cause in fact" of his harm. This means that it must be either a "but for" cause of that harm, or a "substantial factor" in it. For instance, if the defendant starts a fire that burns down the plaintiff's house, the fact that the plaintiff has thrown a match into the flame will not constitute contributory negligence, since the match is not a "substantial factor". See Prosser, p. 421.

2. **"Slightest contribution" rule:** Some courts have said that the plaintiff is contributorily negligent if his negligence contributed to his injury "in any degree, however slight." (Prosser, p. 421). This would seem to make the plaintiff with the match contributorily negligent. But it appears that what courts are really doing when they say this is to define the standard for ***negligence***, not the standard for contribution; that is, the plaintiff is negligent if he departs from a reasonable standard of care in even the slightest respect. Prosser, *ibid.*

3. **Same result, different risk:** There is, however, one important respect in which proximate cause is construed ***more narrowly*** in the case of contributory negligence than in the case of defendant's negligence. In the discussion of intervening causes (*supra*, p. 137), it was noted that where the defendant's conduct is negligent because it threatens a particular kind of harm through a particular manner, and that same harm occurs, but in a different manner, the defendant's negligence is still the proximate cause of the harm. (This was true, for instance, in *Kinsman Transit No. 1 supra*, p. 129). But where the ***plaintiff's*** act is negligent as to his own safety because it threatens a particular harm in a particular manner, and the harm occurs in some other manner, the plaintiff's conduct is usually held ***not*** to be the proximate cause of the harm. See Rest. 2d, §468.

Example: D Co. loads and unloads its trucks in a public alley. D warns P that because of this activity, the alley is dangerous, and that he should

keep out. P goes into the alley anyway, and is hit by a railroad car that gets loose from a siding negligently maintained by D. P's negligence is not the proximate cause of his own injuries, because, although the risk that made his conduct negligent was the risk of being run down, this harm came to pass in a different way than the threatened one (i.e., railroad car rather than truck). See Rest. 2d, §468, Illustration 1.

a. **Explanation:** This more liberal rule of proximate cause is probably best explained by courts' frequent unhappiness with the contributory negligence defense in general, and their desire to limit its application. The "last clear chance" rule, discussed below, is another instance of court-made limitations on the defense.

F. Avoidable consequences: The defense of contributory negligence must be distinguished from that of ***avoidable consequences,*** discussed *supra*, p. 196. The latter is generally held to apply only to conduct by the plaintiff ***after the accident*** which unreasonably fails to mitigate his damages. Contributory negligence, on the other hand, applies to the plaintiff's conduct ***prior to the accident.*** Hence, although both the doctrines of contributory negligence and avoidable consequences rest on the policy of requiring the plaintiff to exercise proper care to protect himself, the rule of avoidable consequences is usually held to come into play only after a legal wrong has occurred but while some damages can still be averted.

1. **Apportionment:** Observe that where the avoidable damages doctrine is applied the result is usually an ***apportionment*** of damages, part to the plaintiff (those that could have been avoided) and the remainder to the defendant. Contributory negligence, on the other hand, is almost by definition a refusal to apportion damages between two causes or two parties.

2. **Exceptions where apportionment allowed:** But there are nonetheless a few sitations in which the damage caused by the plaintiff's negligence and that caused by the defendant's are so distinguishable from each other that apportionment ***will*** be allowed. This might be the case, for instance, if both the plaintiff and the defendant polluted the same stream. See Prosser, p. 423.

   a. **Seat-belt defense:** A similar result is reached by a few courts where the plaintiff has failed to wear a ***seat-belt***, and his injuries can be divided into those which would have occurred even if he had worn the belt, and those which would have been avoided had he done so. These courts allow the plaintiff to recover only for the former (assuming that failure to wear a seat belt is found to constitute unreasonable conduct on the part of the plaintiff.)

      i. **Defense rejected by most courts:** Although the seat-belt defense has been accepted by an increasing number of courts in recent years, it is still probably ***rejected*** by most. See, e.g., *Derheim v. N. Fiorito Co.*, 492 P.2d 1030 (Wash. 1972), holding that since in Washington there is no statutory duty to wear seat-belts, and only cars made after 1964 have to have them, the defense would unfairly discriminate against those whose cars have belts in favor of those whose cars don't. (Even where the defense applies, it has only been held to pertain to plaintiffs who fail to

use an available belt, not to those who fail to have one installed.)

ii. **Avoidable damages:** The seat-belt defense is sometimes allowed on an "avoidable damages", rather than contributory negligence, theory. See, e.g., *Spier v. Barker*, 323 N.E.2d 164 (N.Y. 1974), holding that the defense may be used to block liability for any injuries which would have been avoided had an available seat-belt been worn. It normally makes little practical difference which theory is used.

b. **Excessive speed:** A similar issue is presented by accidents in which the plaintiff's car is traveling at an ***excessive speed.*** If the speed has not increased the risk of the accident, but does increase the damage which results to the plaintiff from it, what is the consequence? Again, as with seat-belts, some courts have tried to apportion the damage, and others have not. See Prosser, p. 424.

G. **Conscious exposure to danger:** One way in which the plaintiff may fail to use due care for his own safety is if he ***consciously*** puts himself in a position of unreasonable danger (as opposed to merely unwittingly and "casually" doing so.) For instance, one who agrees to be a passenger in a car driven by a person he knows to be ***drunk*** may be contributorily negligent. Such conscious exposure to risk also usually gives rise to the defense of "assumption of risk", discussed *infra*, p. 218.

1. **Giving up of right by plaintiff:** Suppose the plaintiff has a ***legal right*** to act in a certain way, but the defendant's negligence renders that act dangerous. In this situation, the plaintiff's insistence on exercising his right is contributorily negligent only if he acts unreasonably; in making this determination, the social value of what he is trying to do will be weighed against the burden of not doing it, and the probability of harm, as in a case involving the defendant's own negligence. (See the Learned Hand test, *supra*, p. 77).

a. **Highway travel:** Thus even though the plaintiff has a legal right to make use of a highway, it may be contributory negligence for him to insist on using it in a situation where the defendant's negligence has blocked the highway and made its use unreasonably dangerous. Whether the danger is "unreasonable" will depend on, among other things, the existence of alternate routes, the importance of plaintiff's trip, etc. See Rest. 2d, §473, Comment b.

i. ***Tedla v. Ellman:*** Thus in *Tedla v. Ellman, supra*, p. 101, rather than focusing on whether it was negligent per se for the plaintiffs to walk on the wrong side of the street where that side was safer, the court might have held that the plaintiffs were negligent regardless of the statute, because they unreasonably insisted on exercising their legal right of using the street in a situation where it was unduly dangerous to do so.

H. **Claims against which defense not usable:** The contributory negligence defense, based as it is upon general negligence principles, may be used as a bar only to a claim that is itself based on negligence.

1. **Intentional torts:** Thus, the defense may not be used where the plaintiff's claim is for an ***intentional tort***. Prosser, p. 426.

2. **Willful and wanton tort:** Similarly, if the defendant's conduct is found to have been "willful and wanton" or "reckless", the contributory negligence defense will not be allowed. Prosser suggests (p. 426) that this is in reality a rule of comparative negligence, with the court "refusing to set up the lesser fault against the greater."

   a. **Gross negligence:** But if the defendant's negligence is merely "gross" (i.e., differing in degree from that of the plaintiff, but not in kind), contributory negligence will be allowed. Obviously it may sometimes be hard to distinguish between negligence that is merely "gross", and that which is "willful". But the idea is that the latter applies to conduct by the defendant which disregards a ***conscious*** risk.

      i. **Plaintiff's similar conduct:** In any event, even if the defendant's conduct is "willful" or "reckless", contributory negligence will be allowed if the defendant shows that the plaintiff's conduct was also "willful", etc.

3. **Strict liability:** For a discussion of the use of contributory negligence as a defense to ***strict liability*** actions, see *infra*, p. 294.

4. **Negligence per se:** Contributory negligence can generally be asserted as a defense even to the defendant's ***"negligence per se"***, i.e., his negligence based on a statutory violation. (See *supra*, p. 96). Rest. 2d, §483.

   a. **Exceptions where responsibility placed on defendant:** But there are some statutes which are enacted solely for the purpose of protecting a class of which the plaintiff is a member, and which show an intent to place all responsibility for violations upon the defendant. Where the plaintiff shows a violation of such a statute, contributory negligence may ***not*** be asserted as a defense.

      Examples: One kind of "special protection" statutes are child labor laws; an employer who hires a child under the legal age may not assert contributory negligence if child is injured. A statute prohibiting the sale of guns to minors might also fall in this category, as do many statutes whose purpose is to protect employees against occupational hazards. See Prosser, pp. 425-6.

I. **Last clear chance:** The most significant limitation on the contributory negligence defense is a rule called the "***last clear chance***" doctrine. While the doctrine may or may not apply in a variety of specific situations, discussed below, the general impact of the rule is as follows: If, just before the accident, the defendant has an ***opportunity to prevent the harm,*** and the plaintiff does not have such an opportunity, the existence of this opportunity (i.e, this last "clear chance") ***wipes out*** the effect of the plaintiff's contributory negligence, leaving the defendant liable if he does not take advantage of that last opportunity.

1. **Rationale:** The doctrine is usually supported by the argument that the defendant's failure to exercise his last opportunity to avoid the harm acts as a ***superseding cause,*** preventing the plaintiff's negligence from being the proximate cause of the accident. However, as is true of the "intervening cause" explanation for the contributory negligence doctrine itself (*supra*, p. 205), this explanation is at odds with accepted notions of proximate cause. Taking the factual example on p. 205, if D1 and his passenger, P, collide with D2, and it is shown that immediately before the collision, D2 had a last clear opportunity to avoid the accident which he failed to use, every court would still hold that D1's own negligence was a proximate cause of P's injuries (although D2's negligence, both in the first instance, and in failing to use his last clear chance, would be an additional proximate cause of these injuries.) If D2's last clear chance does not stop D1 from being a proximate cause of P's injuries, why should it stop D1 from being the proximate cause of his own injuries? See Rest. 2d, §479, Comment a.

   a. **Dislike of defense:** The more realistic explanation of the doctrine is that courts recognize the harshness and frequent unfairness of the contributory negligence defense, and have taken this route, among others, to lessen its use. Rest. 2d, *ibid.*

★ 2. ***Davies v. Mann*:** The last clear chance doctrine first emerged in *Davies v. Mann*, 152 Eng. Rep. 588 (1842). In that case, the plaintiff left his ass blocking the roadway, and the defendant ran his wagon into it. Since the plaintiff had lost the opportunity to prevent the accident by the time it occurred (he had left the ass chained up), and the defendant could have prevented the accident at any time, the defendant was held liable. The court relied heavily on the fact that the animal's presence on the road was "not the immediate cause" of the accident.

3. **Various applications:** There are usually thought to be four distinct kinds of cases in which use of the last clear chance doctrine may occur. These classes are formed by combining the plaintiff's ability to avoid the danger (either he is ***helpless*** to avoid it or he could avoid except that he is so ***inattentive*** that he does not even realize the danger exists) and the defendant's state of knowledge (either he is ***aware*** of the danger, but negligently fails to avoid it, or he is so inattentive that he ***never discovers*** the danger, but could have avoided it if he had discovered it.) In two of these cases (those in which the defendant actually discovers the danger but negligently fails to avoid it), all or the great majority of courts apply the last clear chance doctrine, and refuse to allow the defense of contributory negligence. In one of the other classes, the courts are split, and in the last, only Missouri applies the last clear chance doctrine.

   a. **Plaintiff helpless, defendant discovers danger:** If the plaintiff is ***helpless*** to avoid his predicament, and the defendant ***discovers*** that predicament but negligently fails to use his opportunity to avoid the danger, ***all courts*** (even those purporting to reject the last clear chance doctrine) hold that the plaintiff is not barred from recovery. Rest. 2d, §479.

      Example: P negligently attempts to jay-walk across a busy street. He falls, and is unable to move. D, seeing P lying on the street, attempts to hit the

brakes, but instead negligently hits the accelerator and runs P over. P's contributory negligence in jay-walking will not bar his recovery, because he was a "helpless plaintiff", and D discovered his predicament, but negligently failed to avoid it.

i. **Prior negligence by defendant unnecessary:** In many of the cases in which this "helpless plaintiff, aware defendant" branch of the last clear chance doctrine applies, the defendant has been negligent both before discovering the plaintiff's plight as well as in his response to his discovery of the plaintiff's predicament. But this is not necessary; the doctrine can apply where the defendant's only negligence comes in his failure to reasonably respond to his discovery of the plight. Thus in the above example, the doctrine applies to the defendant's negligent hitting of the accelerator, even though he did not act negligently before discovering the plaintiff's difficulty. See Rest. 2d, §479, Comment g.

b. **Helpless plaintiff, inattentive defendant:** A second class of cases involves a similarly ***helpless*** plaintiff, but a defendant who does ***not discover*** the plaintiff's plight, although he could have discovered it, and avoided it, had he not negligently failed to pay attention. This situation is sometimes called the ***"unconscious last clear chance"*** situation. Most, but by no means all, courts ***allow*** the last clear chance doctrine in this situation. Thus if the driver in the above example had never seen the plaintiff in the road because he had negligently turned to look at his passenger, most courts would still allow the plaintiff to recover. See Rest. 2d, §479.

c. **Inattentive plaintiff, aware defendant:** Now suppose that the plaintiff, rather than being helpless to extricate himself from the danger, could do so, but negligently fails to do so, because he is ***inattentive*** or otherwise careless. If, in such a situation, the defendant ***discovers*** the plaintiff's plight, and then negligently fails to respond to it, most courts similarly hold that the last clear chance doctrine applies. See Rest. 2d, §480.

i. **What constitutes discovery of plaintiff's peril:** For the defendant to be "conscious" of the plaintiff's peril, he must in fact discover the danger, and it is not enough that he merely "should have" discovered the peril. Furthermore, some courts require that the defendant in addition discover the plaintiff's ***inattentiveness***; but most courts hold that it is sufficient if the plaintiff's inattentiveness "should be" evident to the defendant, regardless of whether the defendant was in fact aware of it. In any event, it is clear that where the defendant neither knows nor has reason to know that the plaintiff is inattentive, the defendant has the right to rely on the plaintiff's own attempt to avoid the peril, and he will not be negligent at all for so relying. Prosser, p. 431.

d. **Inattentive plantiff, inattentive defendant:** The last class is that in which either the plaintiff or the defendant could avoid the peril, except that ***neither*** has discovered it due to inattentiveness. In this situation, the

"chance" is so "unclear" that virtually no courts apply the last clear chance doctrine. One state, however, Missouri, does apply it under the name of the "Humanitarian Doctrine". It has been stated that "persons outside the state have not succeeded in understanding [the doctrine], much less in explaining it." P,W&S, p. 600.

4. **Antecedent negligence:** Suppose the defendant discovers the plaintiff's plight, and tries to avoid it, but is unable to do so due to his ***earlier*** negligence. May the plaintiff argue that since the defendant would have had an actual ability to avoid the harm at the last minute except for his earlier negligence, this is the same as having the chance, and the last clear chance doctrine should apply? A few courts have allowed last clear chance in this situation, including an English case set forth in the following example.

   Example: A train owned by D Railroad is approaching a crossing at excessive speed, when the engineer sees P stranded on the tracks. (P has driven his wagon onto the tracks without looking, and once there, cannot react in time to the oncoming train). The engineer hits the brakes, but due to the excessive speed, and due also to the fact that the brakes have been negligently maintained, the train hits P.

   Held, the doctrine of last clear chance applies. D's negligence in having defective brakes and driving the train at excessive speed, although prior in time to P's contributory negligence, was nonetheless the "ultimate" cause of the accident, since without it, the accident would not have occurred. Furthermore, if last clear chance is not allowed, D would be in a better position by supplying bad brakes but a good motorman, as it did, than it would have been had it supplied good brakes but a bad motorman, i.e., one who failed to hit the brakes at all; this would be illogical. *British Columbia Electric Ry. v. Loach*, 1 A.C. 719 (Eng. 1916).

   a. **Majority rule does not allow defense:** But the great majority of American courts do not agree with the logic or result of *British Columbia*, and hold that for the last clear chance doctrine to apply, the defendant must have had an ***actual*** opportunity to avoid the harm at the last moment, not merely an opportunity which "would have existed" had there been no antecedent negligence. The Second Restatement, §479, Comment h, also takes this view.

      i. **Failure to discover defendant's plight:** Nor have most American courts made a special exception where the defendant's antecedent negligence prevents him from ***discovering*** the plaintiff's plight, in a situation where, had there been discovery, the defendant could have actually avoided the harm. Thus if the defendant's lack of adequate headlights on his car prevents him from seeing the defendant, last clear chance will not apply (assuming that the jurisdiction is one in which the defendant's actual discovery of the plaintiff's harm is a necessary ingredient for last clear chance.) See Prosser, p. 432.

5. **General criticism of doctrine:** It has often been pointed out that in many instances, the greater the defendant's negligence, the more likely he is to avoid

having the last clear chance doctrine applied against him. If he negligently fails to discover the plaintiff's danger at all (assuming either that the plaintiff is inattentive or that he is helpless and the jurisdiction is one in which actual discovery of his plight by the defendant is a requisite), last clear chance will not apply. Yet if the defendant keeps a careful lookout, spots the plaintiff, and then nervously hits the accelerator instead, the doctrine does apply. See Prosser, p. 433.

J. Imputed contributory negligence: Even if the plaintiff himself is not actually contributorily negligent, there are a few situations in which another person's contributory negligence may be ***imputed*** to him. The topic of imputed contributory negligence is treated more fully *infra*, p. 248.

II. COMPARATIVE NEGLIGENCE

A. Rejection of "all or nothing" approach: Contributory negligence is, of course, an "all or nothing" system — either the plaintiff is not contributorily negligent, in which case he recovers his full damages, or he is, in which case he gets nothing. In recent years, courts and legislatures have come increasingly to feel that such a system is less fair than one which makes an attempt to apportion damages between the plaintiff and the defendant according to their relative degree of fault.

1. **Jury behavior:** Furthermore, as every tort lawyer knows, juries frequently reject the all or nothing approach, and in effect apportion damages, no matter how clearly the trial judge's instructions attempt to prevent them from doing so. Thus a plaintiff with $200,000 in damages, who the jury believes to have been somewhat contributorily negligent, will frequently be awarded, say, $100,000.

B. Comparative negligence defined: A so-called ***"comparative negligence"*** system rejects the all-or-nothing approach, and instead attempts to divide liability between plaintiff and defendant, in proportion to their ***relative degrees of fault.*** As the idea is often expressed in statutes, the plaintiff is not barred from recovery by his contributory negligence, but his recovery is reduced by a proportion equal to the ratio between his own negligence and the total negligence contributing to the accident (i.e., if there is just one plaintiff and one defendant, their combined negligence).

> **Example:** P suffers damages of $100,000. A jury finds that P was 30% negligent and that D was 70% negligent. P will recover, under a comparative negligence system, $70,000 (i.e. $100,000 minus 30% x $100,000).

C. Historical emergence: Comparative negligence, in certain kinds of cases, has been around for a long time. English courts have applied it in ***admiralty*** (i.e., maritime) cases since 1700, and the U.S. Federal Courts, in the exercise of their exclusive admiralty jurisdiction, have followed it. Several Federal statutes have also applied comparative negligence; the most important of these is the Federal Employer's Liability Act (F.E.L.A.), which as early as 1908 applied comparative negligence to any suit for injuries brought by an employee of an interstate railroad against the railroad.

1. **State statutes:** A few states tried comparative negligence early in this century. Mississippi, for instance, did so by statute in 1910, first as to all personal injuries, and then even in suits for property damage. Wisconsin is also an old-time comparative negligence state, having applied the doctrine to all negligence actions since 1913. See Prosser, p. 436.

2. **Explosion during 1960's:** But it was not until the 1960's that a virtual explosion of comparative negligence in the state courts began. The number of states with general (i.e. applicable to all or most negligence claims) comparative fault systems went from six in 1963 to twenty-eight by 1975 (Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.) In all but three of these states (Alaska, California and Florida) this was done by statute, in the remaining three it was done by state Supreme Court decisions.

   a. **California:** The most of important of the decisions instituting comparative negligence as a matter of common law was that of the California Supreme
   ★ Court in ***Li v. Yellow Cab Co. of California***, 532 P.2d 1226 (Cal. 1975).

      i. ***Li*:** In *Li*, the California Supreme Court was confronted with a statute, passed in 1872, which makes one who negligently or intentionally injures another liable "except so far as the [other] has, willfully or by want of ordinary care, brought the injury upon himself." The court concluded that the legislature had merely attempted to codify the then existing common law, and had not intended to "thwart future judicial progress" towards a more humane system of compensation. Since the contributory negligence defense thus remained basically a common law one, it could be overruled by the judiciary, the court held.

      ii. **"Pure" applied:** The court then decided that a ***"pure",*** rather than a "50%", comparative negligence system should be applied. In a "50%" system, the plaintiff is allowed partial recovery only if his negligence is (depending on the exact wording of the statute or decision) either less than, or no greater than, the defendant's. If he is as negligent or more negligent than the defendant, under such a system he recovers nothing. (As is noted below, most states have adopted this kind of system.) The *Li* court asserted that a 50% system "simply shifts the lottery aspect of the contributory negligence rule to a different ground."

      iii. **Limited retroactive effect:** The court declared that its new system would be applied to any case coming to trial after the date of its decision, even if the accident had happened before the decision. The court also gave the benefit of the new rule to the plaintiff in *Li* itself.

D. Pure v. "50%" systems: Only a minority of states have adopted "pure" comparative negligence. They include California, Florida, and Alaska by judicial decision, and Mississippi, New York, Rhode Island, and Washington by legislation. See P,W&S, p. 608. The federal F.E.L.A. is also a pure system.

1. **Various modified systems:** The remaining comparative negligence states have applied one of two basic cut-offs beyond which the plaintiff may not recover at all. Most states bar the plaintiff's claim as soon as his negligence is ***"as great"*** as the defendant's. The remainder bar him when his negligence is "greater" than the defendant's. Obviously these two systems differ only as to their treatment of the "50-50" case, but given the tendency of juries to regard the negligence of both sides as about the same, this 50-50 case is of considerable importance as a practical matter.

2. **Gross v. slight negligence system:** Nebraska for many years has had a modified comparative negligence system which allows the plaintiff to recover the relative portion of his damages not due to his own fault, but only if his negligence was ***"slight"*** and the defendant's was ***"gross"***. South Dakota had the same rule until 1967, at which point it was changed to allow recovery where the plaintiff was "negligent" (with the word "slight" removed), and the defendant was grossly negligent. This has been an exceptionally hard kind of statute to administer, with frequent appeals as to the meaning of "slight" and "gross", and has not been followed in other states.

E. Multiple parties: Where there are only two parties, a plaintiff and a defendant, the various comparative negligence systems are easy to administer. But what if there is more than one defendant?

1. **All parties before court:** If both (or all) defendants are joined in the same lawsuit, and the system is a "pure" one, the solution is simple. If the total negligence of all parties is determined to be, say, 20% due to P, 50% to D1, and 30% to D2, P recovers 80% of his damages. (He does so in the form of a joint and several judgment against each of the defendants, so he can recover the full amount from each. The defendants may then be able to get contribution from each other so that each ends up bearing the correct portion of his liability — see *supra*, p. 147). This is the approach, both as to the initial judgment, and as to contribution, of the ***Uniform Comparative Fault Act*** (1977), hereafter referred to as the Uniform Act.

a. Not pure: But what if all the defendants are before the court, and the jurisdiction is one in which the plaintiff may recover only if his negligence is less than, or not greater than, that of the defendants? If the plaintiff's negligence is less than that of all the defendants combined, but greater than that of some particular defendant, can the plaintiff recover? Most state statutes leave this question unanswered. It would, however, seem highly unfair to deny a plaintiff all recovery where he is 26% negligent, and three defendants constitute the remaining 74% negligence.

2. **Not all parties before the court:** If not all the defendants are before the court in any single action, the problems become even greater. Juries may reach contradictory results in the various actions, and the jury will have to evaluate the negligence of an absent defendant, which will be hard to do in the usual case where that defendant gives no testimony.

F. How percentage is determined: In most of the comparative negligence systems, the percentage of fault assigned to the plaintiff seems to be based on the relative degree to which his conduct deviated from the standard of care, not the relative ***contribution*** his negligence made. Thus if the plaintiff is only slightly negligent, and the defendant grossly so, the plaintiff will have a relatively small percentage assigned to him, even though, in a causal sense, each person's negligence was clearly a *sine qua non* of the accident.

1. **Contrary view:** But a couple of cases have held that the relative directness of the causal link between negligence and damage may also be considered in assigning the plaintiff his percentage. See, e.g., *Lovesee v. Allied Development Corp.*, 173 N.W.2d 196 (Wisc. 1970). Similarly, the Uniform Act, §2(a), requires consideration of "the extent of the causal relation" between each party's conduct and the resulting harm.

G. Last clear chance: Does the doctrine of ***last clear chance*** survive in a comparative negligence jurisdiction, allowing the entire loss to be thrust upon the defendant?

1. ***Li* solution:** The court in *Li*, *supra*, held that "when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault."

2. **Opposing view:** But other jurisdictions have ***continued to apply*** the doctrine, sometimes on the grounds that the legislature must have been aware of the doctrine, and intentionally failed to abolish it as part of the comparative negligence statute. However, as Prosser notes (p. 439), the answer to this last rationale is probably that "the question simply never occurred to the legislature."

3. **Uniform Act:** The Uniform Act, §1(a), expressly rejects use of last clear chance in comparative fault cases.

H. Willful and wanton misconduct by defendant: We saw (*supra* p. 210) that in many jurisdictions, where the defendant's conduct is "willful and wanton" or "reckless", contributory negligence does not apply. In a comparative negligence jurisdiction, does this kind of willful or reckless conduct by the defendant prevent the plaintiff's damages from being reduced in proportion to his own fault?

1. **Usual approach:** Generally, the statutes have been interpreted to mean that the plaintiff's damages may nonethless be reduced in this situation (although since the plaintiff's wrongdoing is being compared with the defendant's severe wrongdoing, the percentage of fault assigned to the former will generally be quite low). See Nutshell, pp. 136. This is also the approach of the Uniform Act, §1(b).

2. **Intentional tort:** But if the defendant's tort is ***intentional,*** it seems probable that most comparative negligence statutes will be held not to apply, on the grounds that the defendant's conduct is not negligence at all. See *Billingsley v. Westrac Co.*, 365 F.2d 619 (8th Cir. 1966). See also Uniform Act, Comment to §1; but the Uniform Act notes that a court might want to allocate fault, on its own, even in an intentional tort case. (*Ibid*).

I. **Assumption of Risk:** What about the doctrine of ***assumption of risk***, discussed immediately hereinafter; does it survive?

1. ***Li* approach:** The *Li* court held that it will still apply to the extent that it is not simply another kind of comparative negligence. That is, if the plaintiff consciously decides to submit to a certain risk, this will be a complete defense; but if the assumption of risk consists of the plaintiff's negligent and careless exposure of himself to the danger, this is really the same thing as contributory negligence, and apportionment will apply. A roughly similarly approach is taken by the Uniform Act, §1(b), and Comment thereto.

J. **Violation of safety statute by defendant:** Where the defendant violates a safety statute, giving rise to ***negligence per se***, we saw that contributory negligence will normally apply. But, we also saw, if the statute is construed to protect members of the plaintiff's class against their own negligence, and to place all responsibility for this on the defendant, contributory negligence will not apply. In this latter situation, in a comparative negligence jurisdiction, may the defendant obtain apportionment?

1. **General view:** Most courts have held that this distincton between the various kinds of statutes is no longer necessary, in the absence of contributory negligence, and that therefore the defendant may obtain apportionment; see, e.g., *Presser v. Siesel Constr. Co.*, 119 N.W.2d 405 (Wisc. 1963). See also Comment to §1 of the Uniform Act.

2. **Contrary view:** But the contrary conclusion has also been reached. Thus in *Zerby v. Warren*, 210 N.W.2d 58 (Minn. 1973), the defendant storekeeper sold glue to a minor in violation of a statute whose purpose was to prevent minors from glue-sniffing. The purchaser gave some of the glue to his friend, also a minor, who sniffed it, lost his bearing, fell into a creek, and drowned. The court held that the defendant could not obtain apportionment under the Wisconsin comparative negligence statute, on the grounds that if such apportionment were allowed, "the evident purpose of [the statute] would be defeated."

H. **Strict liability:** For the effects of comparative negligence upon strict liability, see *infra*, p. 295.

III. ASSUMPTION OF RISK

A. **Nature of the doctrine:** A plaintiff is said to have ***assumed the risk*** of certain harm if he has voluntarily consented to take his chances that that harm will occur. Where such an assumption of risk is shown, the plantiff is, under traditional common law principles, completely barred from recovery.

1. **Cutting back of doctrine:** However, as will be discussed *infra*, p. 224, there is a tendency in courts which have adopted comparative negligence to hold that assumpion of risk is no longer an absolute defense, but merely a consideration to be taken into account in making an apportionment of harm. Furthermore, some states now refuse to accept assumption of risk as a separate doctrine distinct from contributory negligence, and have in effect abolished it.

B. Classes of assumption of risk: There are several very distinct kinds of situations in which the plaintiff is said to have "assumed the risk" of harm. For purposes of our discussion here, these will be divided into two basic categories, ***"express"*** and ***"implied"*** assumption.

C. Express assumption of risk: If the plaintiff explicitly agrees with the defendant, in advance of any harm, that the plaintiff will not hold the defendant liable for certain harm, the plaintiff is said to have "***expressly***" assumed the risk of that harm. If there is no "public policy" against the assumption of the risk involved, the agreement will be enforced, and the plaintiff may not recover.

★ **Example:** P, a drag racer, signs a release given to him by D Racetrack in which he agrees to "assume all risk of injury to my person and property" that may result from racing on D's track, and also waives any claim for injuries sustained. D's workers negligently allow a cast iron cylinder head to remain on the track, and P's car runs into it, injuring him. *Held*, in this case, there is no public policy against enforcement of the express assumption of the risk by P. He had approximately equal bargaining power (since he did not have to race at that track if he did not want to); nor was D furnishing a service of great importance to the public. Therefore, the release is binding. *Winterstein v. Wilcom*, 293 A.2d 821 (Ct.Sp.App. Md. 1972).

1. **Factors in determining public policy:** As *Winterstein* indicates, there are several factors which courts commonly evaluate in determining whether enforcement of an express agreement to assume risk is against public policy. These include the following:

   a. **Bargaining power:** If the defendant's position as a unique provider of a certain service gives him ***greater bargaining power*** than the plaintiff, and he uses this power to force the plaintiff to waive liability, this will militate against enforcement of the agreement. See Rest. 2d, §496C, Comment j.

      i. **Public service:** Similarly, if the defendant is a common carrier, public utility, or other quasi-monopoly or regulated industry, the plaintiff is less likely to be held to his agreement. In such a situation, it is usually felt that the defendant has undertaken to give careful service to the public at large, and may not escape that obligation by thrusting a piece of paper on the plaintiff.

      ii. **Private merchants:** But if the defendant is a private merchant, who is one of a number providing essentially fungible services, his bargaining position will not normally be so much greater than that of the plaintiff that an explicit waiver of liability will be struck down. Thus in *Jefferson County Bank of Lakewood v. Armored Motors Service*, 366 P.2d 134 (Col. 1961), the plaintiff bank was held to have assumed the risk of theft from the defendant's armored car, for any loss greater than $30,000; this was done pursuant to a "private contract negotiated on a basis of equal bargaining power. . ."

b. **Reduction of liability:** Even in the case of a utility or other regulated public service industry, if the defendant makes an honest attempt to ***fix a reasonable value*** for damages in advance (i.e., liquidated damages), and allows the plaintiff to pay a ***graduated fee*** based on the value fixed, this arrangement will be upheld. Prosser, p. 443.

i. **Parking lots, baggage storage:** Where the defendant is a parking lot or garage, baggage storage concession, or other private business which because of its location is the only one available to the plaintiff, there is a tendency to apply the same rules. That is, a blanket waiver of liability is against public policy, but graduated fees based upon declared value in advance will be upheld. Prosser, pp. 443-4.

c. **Fine print:** The defendant must also show that the terms of the liability limitation were brought home to the plaintiff. This means that the plaintiff must have been actually aware of the limitation, or at least that a reasonable man in the plaintiff's position would have been. Thus if a limitation of liability is buried in fine print on the back of a railroad ticket, and the plaintiff reasonably fails to become aware of this clause, it will not be binding on him. Prosser, p. 444.

d. **Intentionally or willfully negligent misconduct:** Normally, a waiver of liability for the defendant's "negligence" will be construed so as not to include liability for ***"willful and wanton"*** or ***"gross"*** negligence, and certainly not for intentionally tortiously conduct. These may sometimes also be included in the waiver, but only if this is spelled out clearly, and is shown to have been understood by the plaintiff. Rest. 2d, §496B, Comment d.

D. Implied assumption of risk: Even if the plaintiff never makes an actual agreement with the defendant whereby risk is assumed by the former, he may be held to have assumed certain risks ***by his conduct***. In this situation, the assumption of risk is said to be ***implied***.

1. **Requirements for implied assumption:** For the defendant to establish such implied assumption of risk, he must show that the plaintiff's actions demonstrate that he ***knew of the risk in question*** and ***voluntarily consented to bear that risk himself***. This consent may be shown by the fact that the plaintiff has chosen to enter a certain place, to remain in a certain place, to work with certain machinery, etc.

Example: D is dangerously setting off fireworks near a public street. P watches at close range, even though he is aware of the danger of doing so, and is injured by a stray rocket. P has assumed the risk of being injured, and cannot recover. See Rest. 2d, §496C, Illustr. 1.

a. **Distinguished from contributory negligence:** The plaintiff's conduct in assuming risk may also, in many cases, constitute contributory negligence. The connection between these two defenses is discussed *infra*, p. 223.

2. **Knowledge of risk:** For implied assumption of risk to apply, the plaintiff must,

as noted, have had ***knowledge of the risk***. This requirement is usually quite strictly construed.

a. **Particular risk:** First, it must be shown that the ***particular risk in question*** was known to the defendant. One case went so far as to hold that a girl sitting on the driver's lap in a cruising automobile may have assumed certain risks, but that the risk of a collision was not one of them. *Hawthorne v. Gunn*, 11 P.2d 411 (Cal.App. 1932).

b. **Objective standard:** Second, the risk must be one which was ***actually*** known to the plaintiff, not merely one which "ought to have" been known to him.

★ **Example:** P puts a motor vehicle in an alley in order to repair it. He leaves room for other vehicles to pass, and ignores advice that he should park elsewhere, saying that he will be there only for a short while. D, trying to get through the passage, slams into the vehicle, which then crushes P. *Held*, P has not been shown to have assumed the risk of the accident. There is no indication that he was ***actually*** aware of the danger, particularly since he had left enough room for vehicles to pass, and several had done so. It is true that he may have been ***contributorily negligent*** in not anticipating such danger, but this does not mean he assumed the risk (which could only occur with actual knowledge of that risk). *Hildebrand v. Minyard*, 494 P.2d 1328 (Ariz. 1972)

i. **Circumstantial evidence:** But the plaintiff's actual knowledge may be proved by circumstantial evidence. Thus in the case of a speeding car, even if the plaintiff denies having known of the risk, the jury will simply as a practical matter not believe him in the absence of further explanation. Prosser, p. 449. (But the concept is nonetheless an objective one, in the sense that if the plaintiff were shown to be so stupid that he simply could not have appreciated the risk, there will be no assumption of risk even though a reasonable man would have appreciated it.)

c. **Risk of unknown dangers:** Generally, as stated, the plaintiff must have understood the particular risk in question. But there are a few situations in which, by his conduct, he indicates his consent to ***unknown risks***. Thus ***automobile guests*** have often been held to assume the risks of unknown defects in their host's car; see Prosser, p. 449. (But many of these holdings have or will be overruled by more general holdings that, particularly in comparative negligence jurisdictions, there is no separate defense of assumption of risk. See, e.g., *McConville v. State Farm Mut. Auto Ins. Co.*, discussed *infra*, p. 225).

3. **Voluntary assumption:** The requirement that the plaintiff have consented to the risk ***voluntarily*** is also strictly construed. Lack of voluntariness is found in several common situations:

a. **Deliberate encounter of danger:** The mere fact that the plaintiff has deliberately exposed himself to the negligence of others does ***not*** mean that he has consented to this danger. Prosser (p. 450) gives the example of a jay-

walker who walks into illegally speeding traffic; such a person "certainly does not manifest consent that [the drivers] shall use no care and run him down. On the contrary, he is insisting that they shall take immediate precautions for his safety." This is not assumption of risk, although it is contributory negligence. (See the further discussion of this distinction, *infra*, p. 223).

b. **Protest by plaintiff:** What if the plaintiff ***protests*** against being asked to submit to danger, but nonetheless does submit himself? Frequently, he will be held to have "waived" his objection, and to have assumed the risk despite his protest.

   i. **Reliance on safety:** But if he is assured that the danger does not really exist, or that it will be remedied, he has not assumed the risk. For instance, where an employee expresses anxiety about the dangerousness of a machine he is asked to work with, he will not have assumed the risk if he relies on the employer's statement that the machine is safe, or that it will be repaired. (Today, in cases of job hazards, this issue usually does not even arise, since most courts hold, as stated below, that the employee is under duress and has not assumed the risk.)

c. **Duress:** There is no assumption of risk if the defendant's conduct has left the plaintiff with ***no reasonable choice*** but to encounter a known danger.

★ **Example:** P is D's tenant in a building with an outhouse. One day when she is using the privy, she falls through a hole or door in the floor, and has to be taken out with a ladder. *Held*, P did not assume the risk of the defect in the floor. She "had no choice, when impelled by calls of nature, but to use the facililties placed at her disposal by the landlord. . . . She was not required to leave the premises and go elsewhere." *Rush v. Commercial Realty Co.*, 145 A. 476 (N.J. 1929).

   i. **Existence of reasonable alternative:** But if, despite the defendant's conduct, the plaintiff is left with a ***reasonable alternative*** to submitting himself to the danger in question, and he voluntarily declines to follow this alternative, he may have assumed the risk. For instance, in the above example, if there had been another outhouse on the property, which, although slightly less convenient (e.g., further away), was feasible to use and safe, the plaintiff might have been held to have assumed the risk when she used the dangerous one (assuming that she knew of the danger).

   ii. **Determining reasonableness of alternative:** Whether the alternative is a reasonable one or not depends on such factors as the dangerousness of the course finally followed by the plaintiff, the degree of inconvenience in using the alternative, the importance of the interest being pursued by the plaintiff, etc. See Rest. 2d, §496E, Comment d. Thus a man whose house is burning down might be held to have assumed the risk if he dashes in to save his hat, but not if he dashes in to save his son; in either case, he has the alternative of not doing

anything, but this is a reasonable alternative only in the former case. The weighing of factors in determining "reasonableness" is much the same as is done when the contributory negligence of the plaintiff is at issue.

iii. **Choice not created by defendant:** Where it is not the ***defendant's fault*** that the plaintiff has really no choice except to expose himself to risk, this is not enough to vitiate the voluntary nature of the plaintiff's act, and the defense will apply.

Example: P is injured in an accident, bleeding badly, and needs immediate medical help. He has no other means of transportation, so he asks D to drive him to the hospital, knowing that D's car has bad brakes. P assumes the risk of injury due to an accident caused by the bad brakes. This is so because P's dilemma (risk of bleeding to death or risk of bad brakes) is not the result of D's wrongdoing. Rest. 2d, §496E, Illustr. 1.

d. **Employee safety:** Where an ***employee*** is aware of the danger posed by some job-related hazard, it was formerly held (through most of the first half of the twentieth century, at least) that by working, he assumed the risk, and that this consent was "voluntary". This made the assumption of risk defense extremely powerful in employee-employer suits.

i. **Modern view:** Today, Workmen's Compensation statutes have eliminated the issue in most jurisdictions; these statutes provide that for any work-related injury, the plaintiff may recover (from insurance carried by the defendant employer) a statutorily specified amount, regardless of fault. Where such a statute does not exist, most courts now refuse to apply the assumption of risk doctrine, on the grounds that where the employee's choice is between submitting himself to the danger or getting fired, his choice is not a voluntary one. See, e.g., *Siragusa v. Swedish Hospital*, 373 P.2d 767 (Wash. 1962), barring use of the assumption of risk defense in a suit against an employer, but stating that where the employee's submission to the risk was "unreasonable", contributory negligence may be asserted.

4. **Statutory violation by defendant:** Where the defendant's negligence consists of the violation of a statute ***("negligence per se")***, most courts have allowed assumption of risk as a defense in those same situations where contributory negligence would be a defense. That is, it is allowed in all cases except those in which the statute is found to have been intended principally for the benefit of a class unable to protect itself (of which the plaintiff is a member), and the purpose of the statute would be defeated by allowing the defense. Rest. 2d, §496F.

5. **Distinguish from contributory negligence:** When the plaintiff assumes the risk, his conduct will in many cases also constitute contributory negligence. This would, for instance, be the case if he voluntarily but unreasonably decides to take his chances as to a certain risk. In *Winterstein, supra*, for instance, a court or jury might very well find that it was contributory negligence by the plaintiff to enter a drag race with a bunch of other crazy drivers speeding around.

a. **Reasonable assumption of risk:** There are other situations, however, in which conduct which constitutes assumption of risk is ***not*** contributory negligence. This is the case where the plaintiff's decision to undertake a particular risk is a ***reasonable*** one, in light of all the circumstances. This is particularly likely to be the case where the plaintiff has very little choice except to encounter the risk, and this lack of choice is not the result of the defendant's wrongdoing. Thus, in the example on p. 223, the plaintiff who rode in the defective car to the hospital would not be contributorily negligent (because his conduct was reasonable in light of the need to get immediate treatment). Yet the defense of assumption of risk would nonetheless be valid. It is in this kind of situation, where there is no contributory negligence, that the defense of assumption of risk makes its major "contribution" to tort law.

b. **Where contributory negligence also present:** In those situations where the plaintiff's conduct constitutes both an assumption of risk and contributory negligence, it usually makes little difference which defense is asserted by the defendant; (many jurisdictions allow him to assert both). But there are some situations in which, due either to theoretical differences betweeen the two defenses, or procedural distinctions between the two, the assertion of both defenses will not produce identical results. These situations include the following:

   i. **Subjective standard:** The existence of contributory negligence is determined by applying an ***objective*** standard to the plantiff's conduct (i.e., the "reasonable man" approach). But for there to be assumption of risk, it must be shown that the plaintiff ***actually*** understood the risk, not merely that he should have done so. As a practical matter, it may sometimes be easier for the defendant to show that the plaintiff was in fact aware of a certain risk (e.g., by testimony that he was warned) than it is to show that the danger was so great that it was unreasonable to submit to it (a showing which requires the finder of fact to make a value judgment). In other cases, the converse may be true.

   ii. **Defense to reckless conduct:** Contributory negligence is not a defense to ***reckless conduct.*** But assumption of the risk, on the other hand, generally is. Rest. 2d, §496A, Comment d.

   iii. **Strict liability:** If the plaintiff bases his claim on strict liability (as is frequently done in products liability claims — see *infra*, p. 271) contributory negligence will usually not be a defense (although comparative negligence, under an appropriate statute, may be). But assumption of risk usually will be a complete defense. Rest. 2d, *ibid.*

E. **Burden of proof:** Normally, the ***burden of proof***, and the burden of ***pleading***, as to assumption of risk are upon the ***defendant***, as they are in the case of contributory negligence. Rest. 2d, §496, Comment g.

F. **Limitation and abolition:** Many courts in recent years have either curtailed or even abolished some kinds of assumption of risk. Most of this has occurred in the area of implied, rather than express, assumption.

1. **Abolition of implied secondary assumption:** Implied assumption of risk is often divided into "primary" and "secondary" assumption. In cases of "primary" assumption, the defendant is never under any duty to the plaintiff, and the result can generally be described as accurately by the limited duty idea alone, without assumption of risk.

   a. **Illustrations:** For instance, a person who goes to a ballgame cannot sue if he is hit by a foul ball; this result can be explained either by saying he has assumed the risk, or by saying that the ballpark is under no duty to protect him from the risk. The same is true of licensees and invitees on land; thus in *Paubel v. Hitz*, 96 S.W.2d 369 (Mo. 1936), the court held that a postman who slipped on the defendant's premises had assumed the risk of the slippery conditions, because he was fully aware of them; the same result could have been reached by holding that a landowner has no duty to protect an invitee against dangers known to the latter (*supra*, p. 182). This "primary" use of the assumption of risk doctrine has not undergone particular change in recent years.

   b. **Secondary implied assumption:** "Secondary" implied assumption of risk, on the other hand, occurs where the defendant starts out having a duty to the plaintiff, and due to the plaintiff's assumption of a risk, this duty dissipates. Where this occurs in an implied, rather than an express, manner, many courts have sharply cut back on the defense.

      i. **Subsumed within contributory negligence:** If the plaintiff's act in voluntarily exposing himself to the risk was ***unreasonable***, courts have frequently held that this is simply another kind of contributory negligence, and must be treated under the contributory negligence rules. In jurisdictions with comparative negligence statutes, this means that there must be apportionment. See, e.g., *McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2d 14 (Wisc. 1962), holding that an automobile guest whose decision to ride with the defendant is unreasonable must be treated as contributorily negligent, but not as having assumed the risk.

      ii. **Reasonable assumption:** Sometimes, however, the plaintiff's decision to expose himself to the risk is a reasonable one, in view of all the circumstances. See, *supra*, p. 224. In this situation, a number of courts have ***refused to allow*** the assumption of risk defense, on the grounds ★ that it is simply unfair to the plaintiff. Thus in *Springrose v. Willmore*, 192 N.W.2d 826 (Minn. 1971), the court concluded that in all future implied assumption of risk cases, ". . . the plaintiff's assumption of risk must be not only voluntary but, under all the circumstances, unreasonable." (The practical effect was to bring the case within the state comparative negligence statute.) And in *McConville*, *supra*, the court held that the same rule would apply, at least in guest passenger cases: "In a particular situation the utility of riding with the host and the inadequacy of any alternative may both be so obvious that the guest's acquiescence might constitute assumption of risk as heretofore existing, but not a lack of ordinary care. In such circumstances the

guest's acquiescence will constitute no defense under the rule we are now adopting."

iii. **Comparative negligence:** Both *McConville* and *Springrose* arose in comparative negligence jurisdictions. And the California Supreme Court in *Li v. Yellow Cab Co. of California*, *supra*, p. 215, in the very decision announcing comparative negligence, held that implied assumption of risk was thereby abolished as a defense distinct from contributory negligence. It is fair to say that in most comparative negligence jurisdictions, implied secondary assumption of risk will no longer be a complete defense; if the plaintiff's conduct was reasonable in assuming the risk, his recovery will not be reduced at all in these jurisdictions. If it was unreasonable, it will be treated just like any other contributory negligence, and the recovery will be proportionately reduced.

IV. STATUTE OF LIMITATIONS

A. **Discovery of injury:** A frequent defense in tort actions, as in most other legal actions, is the ***statute of limitations.*** A general discussion of this defense is beyond the scope of this outline. However, there is one aspect of it that has troubled courts for a long time, and as to which the rules are rapidly changing: When the plaintiff does not ***discover*** his injury until long after the defendant's negligent act occurred, does the statute of limitations start to run at the time of the act, or at the time of the discovery?

1. **Medical malpractice:** The question arises most frequently in ***medical malpractice*** cases. Suppose, for instance, a surgeon leaves a surgical sponge in his patient. If the relevant statute of limitations is four years, and the patient does not discover the sponge until five years after the operation, is he barred by the statute?

   a. **Former view:** Until the last fifteen years or so, it was almost always held that the statute started to run as soon as the negligent act was committed, and if the plaintiff did not discover his injury until after the statute had run, that was his hard luck.

   b. **Recent view:** But many courts have recently refused to continue this injustice. Several approaches to the problem have been used:

      i. **Termination of treatment:** Some courts have held that the statute begins to run when the doctor-patient relationship terminates, even if the plaintiff has not discovered his injury. This gives him at least some extra time. See P,W&S, p. 636.

      ii. **Only for objects left in body:** Other courts have applied a time-of-discovery rule, but only where the claim involves an object left in the patient's body, not where the case involves a mistaken diagnosis, or surgery that is negligently performed without leaving an object. P,W&S, *ibid.*

iii. **All surgical cases:** Many states now apply the time-of-discovery rule to all surgical cases, whether involving foreign objects or not. See, e.g., ★ *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974), holding that the statute begins to run "when the patient discovered, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered, the resulting injury." In *Teeters*, the injury was an incompetently performed tubal ligation; the statute was held to have begun running when P discovered, or should have discovered, that she was pregnant.

iv. **Statutory solutions:** A number of states have dealt with the problem by statute. New York, for instance, has shortened the statute for medical malpractice from three years to two and one-half years, but provides that the statute does not begin to run until the date of last treatment (if the treatment is for the same illness as that which gave rise to the malpractice); also, where the claim involves a foreign object left in the body, the patient has ***one year*** to sue starting with the time the injury was or should have been discovered. As to all other malpractice, the statute runs from the time of injury. C.P.L.R. §214-a.

2. **Other professionals:** A similar issue arises frequently in the case of malpractice by other professionals, particularly lawyers, architects and engineers. The time-of-discovery rule has sometimes been applied in such cases. P,W&S, p. 637.

V. IMMUNITIES

A. Definition of immunity: An immunity is a defense to tort liability that is given to an entire ***class*** of persons based on their relationship with the prospective plaintiff, the nature of their occupation, their status as a governmental or charitable entity, etc. The common law created a number of virtually complete immunities, but all of these are beginning to break down at least to some extent, either by statutory reform or judicial overruling.

B. Family immunity: The common law recognized two immunities from suit growing out of the family relationship: that between ***spouses***, and that between ***parent and child.***

1. **Husband and wife:** At common law, the husband and wife were considered as one person (and, as was often noted, that person was the husband). Therefore, it was considered illogical to allow the husband to bring a tort suit against his wife, or vice versa. Married Women's Acts, passed in the late nineteenth century, giving women property rights and legal identity, were held to allow at least suits between husband and wife regarding ***property interests***.

   a. **Personal injury suits:** But the inter-spousal immunity continued with respect to suits for personal injury. This meant that a wife who was injured

while a passenger in a car driven negligently by her husband could not sue him; nor could a battered wife recover for her abuse.

b. **Half of states now allow:** But nearly half of the states have now completely ***abolished*** the inter-spousal immunity, even for personal injury suits. See P, W&S, p. 641. See also Rest. 2d, §895G. In doing so, the courts have rejected a number of extremely weak arguments for continuing the immunity.

c. **Reasons for rejecting:** The Supreme Court of Washington, in *Freehe v.* ★ *Freehe*, 500 P.2d 771 (Wash. 1972), rejected all the traditional reasons for the immunity, including the following:

i. **Immunity of husband and wife:** First, the one-ness of husband and wife clearly no longer exists under modern law.

ii. **Peace and tranquility:** Second, it is not true that permitting suits between husband and wife would destroy the "peace and tranquility" of the home. "If a state of peace and tranquility exists between the spouses, then the situation is such that either no action will be commenced or that the spouses — who are, after all, the best guardians of their own peace and tranquility — will allow the action to continue only so long as their personal harmony is not jeopardized. If peace and tranquility is nonexistent or tenuous to being with, then the law's imposition of a technical disability seems more likely to be a bone of contention than a harmonizing factor."

iii. **Flood of litigation:** A fear that abrogating the immunity would lead to a flood of litigation, involving trivial matrimonial disputes, has not materialized in other states that have previous abolished the immunity.

iv. **Collusion:** It is true that there is some risk of ***collusion and fraud*** between the spouses, since the defendant spouse may carry liability insurance, and may intentionally put forward a weak defense so that the plaintiff can collect the insurance. But the solution for this is to make sure that the courts "ferret out the meritorious from the fraudulent in particular cases", not to bar all inter-spousal cases because of the possibility of fraud in some.

d. **Partial abolition:** In those states that have not completely abolished the immunity, a number of ***limitations*** on it are commonly applied.

i. **Termination of marriage:** If the marriage has been ***terminated*** before the suit, the immunity will usually not apply. This is true not only where there has been a divorce, but also where one spouse has died. For instance, the estate of a deceased spouse might sue the surviving spouse in a wrongful death action. See Rest. 2d, §895G, Comment d.

ii. **Tort before marriage:** Similarly, if the tort occurred ***before*** the parties were married, some courts do not apply the immunity. Rest. 2d, *ibid.*

iii. **Intentional personal injury:** If the personal injury derives from an intentional tort (e.g., assault or battery), some courts do not allow the immunity.

iv. **Automobile suits:** A number of states have abolished the immunity, as to ***automobile accident*** suits.

e. **Vicarious liability:** Almost all states that have not abolished the immunity nonetheless permit a husband or wife to sue one who is ***vicariously liable*** for the other spouse's torts, even if the spouse himself could not be sued. Thus if a husband and wife work for the same employer, and the husband negligently injures the wife in a car crash while they are on a joint business trip, the wife could sue the employer under the doctrine of *respondeat superior* (see *infra*, p. 238), even though the inter-spousal immunity might bar her from suing her husband directly. See Nutshell, p. 416.

f. **Extent of duty where immunity abolished:** Once the immunity has been abolished, what is the standard of care of each spouse to the other? After all, a "reasonable man" will not necessarily behave with the same carefulness to his wife as he would to a stranger. One court, after abolishing the immunity, stated "The risks of intentional contact in marraige are such that one spouse should not recover damages from the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege. The risks of negligent conduct are likewise so usual that it would be an unusual case in which the trial court would not instruct the jury as to the injured spouse's peculiar assumption of risk." *Beaudette v. Frana*, 173 N.W.2d 416 (Minn. 1969).

i. **Automobile accidents:** But the vast majority of inter-spousal suits involve ***car accidents***, in which one spouse is the driver while the other is the passenger. In this situation, courts probably have a tendency to impose the same duty of careful driving on the driver as where the passenger is a stranger.

2. **Parent and child:** In the United States (but not in England), a common law immunity also developed to bar suit by a ***child against his parents*** or vice versa. Except for the "one-ness" of husband and wife, the same justifications for inter-spousal immunity were usually given to support the parent-child immunity.

a. **Abolition by some states:** About a third of the states have now abolished this immunity, at least in automobile accident suits. One factor that is frequently stressed is that nearly everyone has liability insurance, and such suits usually are not between members of the family, but between the family ★ and the insurance company. For instance, in *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969), the court noted that in New York, there is compulsory motor vehicle liability insurance, and that a suit whose real purpose is to recover against this insurance will not threaten family harmony. Also, the court noted, New York already recognized that the immunity was no longer applied once the child is emancipated, and no

purpose is served by simply postponing the litigation until this time (as the tolling provisions of the New York Statute of Limitations permitted, at least where the plaintiff is the child).

b. **Exceptions:** As in the case of inter-spousal immunity, a number of states that have not completely abolished the doctrine have developed exceptions to it. Frequent exceptions include the following:

i. **Emancipation:** If the child has been legally ***emancipated*** (i.e., of legal age or where other circumstances indicate that the parent has renounced his right to the child's earnings);

ii. ***In loco parentis*:** Where the defendant is a ***step-parent or guardian***;

iii. **Relationship terminated by death:** Where the parent-child relationship has been terminated by the ***death*** of one or the other prior to the suit;

iv. **Wrongful death of other spouse:** Where the plaintiff-child is suing his parent for the wrongful death of the other parent;

v. **Intentional or willful:** Where the tort is ***intentional***, or in some cases "willful";

vi. **Property rights or pecuniary loss:** Where the action is for something other than personal injury (i.e., property loss, pecuniary loss);

vii. **Business activity:** Where the injury occurred during the course of ***business activity*** by the defendant;

See generally, P,W&S, pp. 646-7; Rest. 2d, §895H, Comments d-i.

c. **Duty of supervision:** When the immunity is abolished (or if not abolished where the suit falls within one of the above exceptions), what is the standard of care which one party owes the other? The most troublesome aspect of this question has been the extent of the ***duty of supervision*** owed by a parent to a young child. A number of courts have refused to allow recovery for breach of such a duty.

★ **Example:** P, a four-year-old, falls off an eleven foot high slide in a playground. A guardian appointed by the court brings suit on his behalf against the child's father, who was there at the playground, and who, the suit alleges, negligently failed to supervise his son. *Held*, (along with two other suits posing the same issue of parental supervision), P and the other infant plantiffs have no claim for negligent supervision by their parents. To recognize such a claim would "circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence." *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974).

i. **Parent as third party defendant:** In one of the three cases involved in *Holodook*, the plaintiff was a young child who was hit by the defendant's car when he darted out between two parked cars. The defendant brought a third party claim against the plaintiff's father,

alleging that the latter was jointly liable because of his negligent failure to supervise his child. In denying the general existence of a claim based on the failure to supervise, the court noted that such a claim would permit the driver to obtain contribution from the father, and that this would reduce the plaintiff-child's compensation. Therefore, the court decided, it was best not to recognize the general duty of parental supervision, and to safeguard the child's right to get compensation from strangers, even at the expense of his right to compensation in a direct action against his parent.

3. **Siblings:** There is no immunity between ***siblings.*** See Rest. 2d, §895I. Nor is there any other family relationship (e.g. grandparent-grandchild) as to which there is immunity.

C. **Charitable immunity:** ***Charitable organizations***, as well as educational and religious ones, received immunity at common law.

1. **Rationale:** Two principal reasons have been given for this:

a. **Trust fund:** First, the charity holds the donations it receives in trust, and the donor has not given these funds with the intention that they be used to pay tort claims.

b. **Implied waiver:** Second, the beneficiary of charity (e.g. one who uses a charitable hospital) has "impliedly waived" his right to sue in tort, by virtue of having accepted this benevolence.

2. **Overruling:** By now, more than thirty states have abolished charitable ★ immunity. See Rest. 2d, §895F. See, e.g., *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (Mo. 1969), which relied on the availability of liability insurance in abolishing the defense (although the existence of such insurance in any particular case was held to be irrelevant to liability). The court refuted the "trust fund" and "implied waiver" arguments as follows:

a. **Trust fund:** Liability should not be determined based on whether the charity can ***satisfy*** a judgment. Therefore, whether donated funds held in trust can pay such judgments is irrelevant.

b. **Implied waiver:** There are at least some people who could not possibly have "waived" their right to sue, such as an unconscious accident victim carried to a charitable hospital, or a baby. Hence, the implied waiver theory is obviously a legal fiction.

3. **Limitations:** Those states which have not abolished the immunity completely have carved out a number of limitations upon it:

a. **Abolished as to the hospitals:** Some have abolished it as to charitable hospitals, but have kept it concerning religious or educational institutions.

b. **Beneficiaries:** Others have maintained the immunity where the plaintiff is a beneficiary of the charity (e.g. a patient at the charitable hospital), but not

where he is an employee, stranger, or other non-beneficiary. The theory behind this is presumably that the "implied waiver" doctrine applies only to beneficiaries.

c. **Liability insurance:** Still other courts deny liability where a judgment would have to be satisfied out of trust funds, but not where there is liability insurance. This result is reached by recognizing the validity of the trust fund argument, but cutting it back to those cases where it applies directly to the facts. See generally, Rest. 2d, §895F.

D. Governmental immunity: At English common law, "sovereign immunity", i.e., immunity of the king, developed. The doctrine, which was connected to the divine right of kings, was sometimes expressed by saying that "the king can do no wrong."

1. **United States:** Early American courts applied the English rule to hold that the ***United States*** could not be sued without its consent. The first major and meaningful consent by the United States to tort claims was embodied in the 1946 Federal Tort Claims Act (FTCA). Because this Act continues today to be dispositive of almost all possible tort claims agains the government, its provisions are worth looking at in some detail.

   a. **General provision:** The FTCA provides generally that money damages may be recovered against the United States ". . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment", if the claim is such that the U.S. could be sued if it were a private person. This means that in any situation in which the doctrine of *respondeat superior* (see *infra*, p. 238) would apply if the tortfeasor were a private employee, the U.S. may be sued by use of that same doctrine. 28 U.S.C.A. §1346(b).

   b. **Exceptions:** However, several exceptions substantially limit the scope of federal tort liability. The most important of these are as follows:

   c. **Intentional torts:** The U.S. is ***not*** liable for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." However, this clause was recently amended to provide that assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, where committed by "***investigative or law enforcement officers***" of the federal government, may be sued upon. Thus a police brutality claim might be brought against the government for a battery committed by an F.B.I. agent, for instance.

      i. **Mostly intentional torts:** Most of the torts excluded by 28 U.S.C.A. §2680(h) are ones which can only be committed intentionally. But the exclusion has also been held to apply to ***misrepresentation***, even where it is merely negligent.

   ★ **Example:** P, a young man of draft age, receives #309 in the 1969 Draft Lottery. This number should be high enough to prevent him from being

drafted. However, due to a clerical error by his local draft board, the number is recorded as 132, and he is drafted. Several months later, the error is discovered, and he is released from his tour of duty in Vietnam. He sues the U.S. for lost wages as well as punitive damages. *Held*, on appeal, P's claim, although phrased in terms of negligence, was really for the government's ***misrepresentation*** to him that he had to enter the army. Misrepresentation is one of the torts excluded by 28 U.S.C.A. §2680(h), even though it was negligent, not intentional. *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975).

Note: It can certainly be argued that the tort in *Fitch* was not merely misrepresentation to him that he had to be drafted, but rather the government's non-misrepresentational ***act*** in compelling his enrollment.

Note: As the court in *Fitch* observed, the plaintiff, like any citizen, is always free to try to get a ***private bill*** passed by Congress, enabling him to bring suit. In fact, prior to the FTCA's adoption in 1946, hundreds of such bills were passed annually, since there was no other way to sue the U.S. in tort.

d. Execution of statute or regulation: Another exception to the U.S.'s liability is where a government official, using due care, carries out a ***statute or regulation*** which later turns out to be invalid. 28 U.S.C.A. §2680(a).

e. Discretionary function: But the most important exclusion, which sometimes seems to swallow the whole Act, is that no liability may be "based upon the exercise or performance or the failure to exercise or perform a ***discretionary function*** or duty on the part of a Federal agency or an employee of the Government, ***whether or not the discretion involved be abused***." 28 U.S.C.A. §2680(a). This section was designed to insure that the Government was not prevented from exercising its leadership and planning functions by the institution of tort suits attacking the manner in which this was done.

i. **Discretionary v. operational functions:** "Discretionary" functions are generally contrasted with "operational" ones. What occurs at the planning stage is usually discretionary, whereas the ***carrying out*** of the plans is usually held to be operational, and thus not within the exclusion for discretionary functions. Nonetheless, the distinction can be very hard to draw in a particular case.

ii. ***Dalehite v. United States*:** The major Supreme Court case on what constitutes a "discretionary" function is *Dalehite v. United States*, 346 U.S. 15 (1953). In that case, a fertilizer exportation program run by the government led to an explosion. The Court held that decisions as to how the product should be coated and bagged, how the bags should be labelled, and how the product should be transported were all made at the "planning" level. Therefore, any negligence belonged to those that did the planning, not the underlings who carried out the program, and liability was denied.

iii. **Strict liabilty:** The *Dalehite* case also held that the government could not be held ***strictly liable*** under the FTCA. The Court pointed to the fact that the statute refers only to a "wrongful act or omission", and stated that this phrase meant that there must be "some brand of misfeasance or nonfeasance".

2. **State governments:** ***State governments*** have traditionally had a similar sovereign immunity. This immunity too, however, is rapidly breaking down. By 1976, only twelve states maintained the complete historical immunity. More than twenty states had abolished it totally, most of them by statute, but a number by judicial decision. (See the Appendix to *Hicks v. State* , 544 P.2d 1153 (N.M. 1976).)

   a. **Rationale:** The states that have rejected immunity judicially have pointed to the availability of public liability insurance, the fact that excess litigation has not developed where the immunity has been abolished, and the inapplicability in modern times of doctrines like "the king can do no wrong". As one court held (quoting Prosser), " . . . the torts of public employees are properly to be regarded . . . as a cost of the administration of government, which should be distributed by taxes to the public."*Ayala v. Philadelphia* ★ *Board of Public Education*, 305 A.2d 877 (Pa. 1973).

   b. **State agencies:** Where the immunity does still exist, it extends to state agencies and departments, such as prisons, hospitals, educational institutions, highway authorities, etc. Prosser, p. 976. However, the court is always free to find that in creating the agency in question, the legislature intended that the immunity not apply. Prosser, *ibid.*

      i. **Insurance:** A number of states that have refused to abolish state immunity across-the-board have abolished it in those cases where the state has purchased ***liability insurance.*** See Rest. 2d, Tentative Draft No. 19, Special Note to §895B.

   c. **Courts, legislatures and policy-makers:** Where the immunity has been judicially or statutorily abolished, there will nonetheless almost never be liability for acts of the ***courts*** of the state, or its ***legislature***. Nor will there be liability for administrative actions which involve a "basic policy decision". See Rest. 2d, §895B(3).

3. **Local government immunity:** Units of ***local government*** have generally had at least partial immunity. Thus a ***city***, school district, local public hospital, etc., when it conducts activities of a governmental nature, has been immune. But where such local units (often called "municipal corporations") perform functions that could just as well be performed by private corporations, there has traditionally ***not*** been immunity. The distinction is between ***"governmental"*** and ***"proprietary"*** functions.

   Example: P sues D, a public hospital run by a county, alleging that its employees negligently carried out a blood transfusion. *Held*, the running of the hospital is a "proprietary" function. Running hospitals is not a function

that has been "historically performed by the government", and is one which is often engaged in by private corporations. Furthermore, D charges for its services, indicating its proprietary nature (and this is so even though the hospital as a whole may run at a deficit.) Therefore, P may maintain his suit. *Sides v. Cabarrus Memorial Hospital, Inc.*, 213 S.E.2d 297 (N.C. 1975).

a. Governmental functions: Police and fire departments, school systems, health inspectors, and the like, are usually held to be involved in governmental functions. Thus even if a policeman beats up the plaintiff without any excuse, suit cannot be brought against the department or city (assuming that there has been no abolition of local government immunity, as discussed below).

b. Revenue-producing activities: But activities which produce ***revenue*** for the government, such as gas or water utilities, airports, garages, etc. are generally held to be proprietary. See Prosser, pp. 980-1

c. General abolition: Partly because of the difficulty of distinguishing between "governmental" and "proprietary functions", many courts (twenty-five by 1973 — see Rest. 2d, Tentative Draft No. 19, Special Note to §895C) have abolished the general local government immunity, and at least fifteen others allow suit where liability insurance has been purchased. (*Ibid*). But legislative and judicial functions continue to be immune, as are administrative policy decisions. Rest. 2d, §895C(2).

d. Extent of duty: Assuming a municipality no longer has immunity, what duties does it owe its citizens? In general, the answer has been that the duties are ***narrower*** than they would be if the defendant were a private corporation. This is due partly because of courts' desire not to second-guess the discretionary and policy decisions made by administrative officials.

★ **Example:** P, a young woman, is repeatedly threatened by a suitor, X (a lawyer!), that if she will not marry him, he will fix it so "no one else will want you". P repeatedly asks the police of D (New York City) for protection, which they refuse. X then hires a thug to throw lye in P's face, partially blinding her. *Held*, D has no duty to provide police protection to any particular member of the public. If such duty were recognized, and enforced by the courts, this would "inevitably determine how the limited police resources of the community should be allocated and without predictable limits."

A dissent argued that the police's denial of protection to P was not a "conscious choice of policy" but simply "garden variety negligence", which should be actionable. "No one is contending that the police must be at the scene of every potential crime or must provide a personal bodyguard to every person who walks into a police station and claims to have been threatened. They need only act as a reasonable man would under the circumstances," said the dissent. *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

4. **Government officials:** In addition to the immunity sometimes conferred upon governments, ***public officials***, in their private capacity, may also have tort immunity. Such immunity is of common-law origin, and may also exist even where sovereign immunity has been abolished as to the tort in question.

   a. **Rationale for immunity:** The principal rationale for granting at least partial immunity to public officials is that, otherwise, the fear of "vexatious suits" (most of them without merit) will prevent officials from making the necessary decisions and carrying out the duties of government. See Rest. 2d, §895D, Comment b.

   b. **Legislators and judges:** ***Legislators*** and ***judges*** receive ***complete immunity***, as long as their act is within the broad general scope of their duties. This is so even if such an official is clearly motivated by malice, greed, corruption, etc. The only exception to the rule is that there is no immunity where the act is "wholly beyond the jurisdiction" of the official. But this is true of few acts, particularly in light of a recent Supreme Court decision, set forth in the following example.

      Example: D, a local judge, orders P, a fourteen-year-old girl, to be sterilized. The order is given in response to a petition by P's mother, and with no notice to P. Nor is there any statutory authorization for such a judicial order. *Held*, D was not acting wholly without jurisdiction, even though he had no express statutory authority for what he did. *Wade v. Bethesda Hospital*, ——U.S.—— (1978).

   c. **Administrative officials:** High administrative officials, in many states, receive a similar complete immunity for torts committed within the general scope of their duties. In the other states, however, even such high officials have only a limited immunity, which will not protect them if it is shown that they acted in ***bad faith***. P,W&S, p. 674.

   d. **Lower officials:** Low-ranking officials, on the other hand, generally receive no immunity at all where the act in question is "operational", as opposed to "discretionary". If the act is discretionary, they usually receive the same treatment as higher officials, whatever that treatment is in the jurisidiction in question. The distinction between operational and discretionary acts is generally done on the same basis as it is with respect to local government immunity (see *supra*, p. 234.)

   e. **Statutory treatment:** Several Federal statutes directly affect public officials' immunity in certain kinds of actions.

      i. **Civil Rights:** The Civil Rights Act of 1871 (42 U.S.C.A. §1983), provides that any person who, "under color of any statute, ordinance, regulation . . . of any state" violates the Federal civil rights of any person, "shall be liable to the party injured in an action at law. . . ." This statute applies to state and local officials, and a similar judge-made rule probably applies to Federal officials. See Rest. 2d, §895D, Comment i.

      ii. **Federal Tort Claims Act:** Conversely, the Federal Tort Claims Act

provides that in the case of any injury arising out of a Federal employee's operation of a ***motor vehicle***, the ***only*** liability is against the government, and the employee is immune. 28 U.S.C.A. §2679(b).

VICARIOUS LIABILITY

I. VICARIOUS LIABILITY GENERALLY

A. Nature of doctrine: The doctrine of ***vicarious liability*** provides that in some situations, the tortious act of one person may be imputed to another, because of some special relationship between the two. As a result, the latter will be held liable, even though his own conduct may have been completely blameless. The most frequent situation in which vicarious liability exists is that involving tortious acts (usually negligent ones) committed by an ***employee***; under appropriate circumstances, the employer is held vicariously liable for the tort.

1. **Other relationships:** In addition to the employer-employee situation, vicarious liability may exist because of an employer-independent contractor relationship, a "joint enterprise" relationship, a family relationship (where a "common family purpose" is involved), etc.

2. **Imputed contributory negligence:** Furthermore, where such a relationship exists, a doctrine know as "imputed contributory negligence" may apply. This doctrine (discussed *infra*, p. 248)provides, roughly, that where a plaintiff would be liable to a defendant for the tortious acts of a third person, the contributory negligence of that third person will be imputed to the plaintiff, barring his recovery.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

A. *Respondeat superior* doctrine: If an employee commits a tort during the "***scope of his employment***" his employer will (jointly with the employee) be liable. This rule is often described as the doctrine of ***"respondeat superior"*** (which means, literally, "Let the person higher up answer.")

1. **Rationale:** Many explanations are given for this doctrine. But the most convincing is that accidents which arise directly or indirectly out of an enterprise ought to be paid for by the entrepreneur in question, as a cost of doing business. As the idea is sometimes put, the employer often has a "***deep pocket***", whereas the employee is frequently judgment-proof. Furthermore, the employer is in a better position to obtain insurance against work-related accidents than is the employee.

2. **Applies to all torts:** The doctrine applies to ***all*** torts, including ***intentional*** ones and also those situations in which ***strict liability*** exists. But the tort must have occurred during the scope of the employee's employment, a requirement discussed below. Particularly in the case of intentional torts, the employer is often able to avoid liability by showing that the employee was acting completely for his own purposes, not his employer's.

B. Who is an "employee": Vicarious liability applies more frequently to torts

committed by employees than to those committed by independent contractors (see *infra*, p. 243). Therefore, it is important to be able to tell whether a particular tortfeasor was an employee or independent contractor.

1. **Distinction:** While no single factor is dispositive in all cases, the main idea is that an employee is one who works ***subject to the control*** of the person who has hired him. An independent contractor, on the other hand, although he is hired to produce a certain result, is not subject to the control of the one who has hired him while he performs his work. He is, in a sense, his own boss.

   a. **Prosser's test:** As Prosser puts the idea, a person is an employee (or a "servant" as older cases call him) ". . . when, in the eyes of the community, he would be regarded as a part of the employer's own working staff. . . ." Prosser, p. 460.

   ★ **Example:** D1 owns a mine, and D2 operates it for him. P, who works in the mine, is killed, and his estate sues both D1 and D2. *Held*, D2 was an independent contractor, and D1 is therefore not liable for D2's torts. D2 had complete charge of the mining operations, paid D1 for the coal taken out of the mine by the ton, and hired and fired his own workers, including P. D2's right to run the mine as he wished was therefore extensive enough to prevent him from being an employee of D1. *Turner v. Lewis*, 282 S.W.2d 624 (Ky. 1955).

C. **Scope of employment:** The most difficult question in the entire area of *respondeat superior* is whether, in a particular case, the employee was acting ***"within the scope of his employment"*** when the tort occurred. In general, the tort is within the scope of employment if the tortfeasor was acting, with an ***intent to further his employer's business purpose,*** even if the means he chose were indirect, unwise, and perhaps even forbidden. And he will be within the scope of his employment even if his intent to serve his employer is coupled with a separate personal purpose.

   ★ **Example:** Fruit, an insurance salesman, attends a convention in Alaska run by his employer, the D Insurance Co. He is encouraged to "mix freely" with out-of-state insurance experts who are also at the convention, in order to learn about "sales techniques." One night, after the day's convention activities are over, he goes to a bar in order to look for some out-of-state colleagues, sees that they are not there, and heads back to his hotel. Enroute, he negligently collides with P.

   Held, Fruit was acting within the scope of his employment at the time of the accident. In going to the bar, he was motivated at least in part by a desire to socialize with these experts, whom he had been encouraged to get to know. Furthermore, a liberal view should be given to the concept of "scope of employment", in view of the fact that the basis for the doctrine of *respondeat superior* is "the desire to include in the cost of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefitted by the enterprise." *Fruit v. Schreiner*, 502 P.2d 133 (Ala. 1972).

1. **Trips from home:** Most courts hold that where an accident occurs where the

employee is travelling ***from his home*** to work, he is not acting in the scope of his employment; this conclusion is often based on the theory that the employer has no "control" over the employee at that time.

★ **Example:** X, an engineer employed by D (the State of New York), is travelling from his home to a reservoir eighty miles away. D pays X a mileage allowance for the trip, and also agrees to pay his hotel expenses if he stays overnight. During the trip, X negligently collides with P. *Held*, X was not within the scope of his employment at the time of the accident. The state had no control over his activities, and to hold it liable "would be patently unfair and beyond the scope of the doctrine of *respondeat superior*." The existence of the mileage allowance is irrelevant, since it did not indicate control. Furthermore, P had already been to the reservoir at the end of the previous week, and could have stayed there over the weekend at the state's expense; therefore, his need to take the trip from his home to the reservoir was created solely by his personal decision to go home. D thus has no vicarious liability. *Lundberg v. State*, 255 N.E.2d 177 (N.Y. 1969).

A dissent contended that X's trip should be held to have been within the "scope of his employment" merely because the employment created the necessity for the trip; had X not been working at the reservoir, he would not have been taking the trip. Furthermore, this fact was recognized by the State's granting of a mileage allowance to X.

a. Returning home: Where the employee is ***returning home*** after his business activities, courts are divided, although most would probably deny liability on the employer's part here as well.

2. Frolic and detour: It frequently happens that, while on a business trip, the employee makes a short "side trip", or ***"detour"***, for his own purposes.

a. Traditional view: The traditional view has been that while the employee is on the first leg of his side trip (i.e., going to the personal objective), he is engaging in what is often called a "frolic and detour", and is thus not within the scope of his employment. But as soon as he begins to return towards the path of his original business trip, he is once again within the scope of his employment, no matter how far afield he may be at that point.

Example: X is supposed to take a trip due west to Carrington on business. Instead, he goes fifteen or twenty miles north, on a personal errand. After the errand, he goes west, intending eventually to head south toward Carrington. While going west, he negligently collides with P. *Held*, the jury could reasonably decide that X was acting within the scope of his employment at the time of the accident. If the accident had occurred while X was heading north towards his errand, the result might be otherwise. But here, he was "undeniably en route back to the course from which he departed", and had therefore "resumed his [business] purpose." *Kohlman v. Hyland*, 210 N.W. 643 (N.D. 1920).

b. Modern view: But many modern courts have taken a less "mechanical" view of the "frolic and detour" problem. See Prosser, p. 463. These courts

have held that the employee is within the scope of business if the deviation is "***reasonably foreseeable***". Under this view, the employee might be within the scope of employment even while he was heading toward the object of his personal errand, if this deviation was slight in terms of distance. But if the deviation was large and unforeseeable, in terms of miles, then the employee is not within the scope of business even while heading back towards his business goal, at least until he gets reasonably near the route he was supposed to take. Prosser, *ibid.*

i. **Smoking and other personal objectives:** A similar "foreseeability" test is often applied to other acts done by employees which are not specifically in furtherance of their employer's business interest. Thus an employee who ***smokes***, or who is on his way to the toilet, would probably be held by most modern courts to be engaged in an activity so foreseeable that it was done within the scope of employment. Prosser, p. 462.

3. **Acts prohibited by employer:** Since the whole idea behind *respondeat superior* is that the employer is liable completely ***irrespective of his own negligence***, it follows that employer liability will exist even if the acts done were expressly ***forbidden*** by the employer, as long as it is found that they were done in furtherance of the employment. For instance, even if a storekeeper expressly orders his clerk never to load a gun while showing it to a customer, there will be liability if the clerk does so, since he is furthering the general business purpose of selling the gun. Prosser, *ibid.*

a. **Relevant to scope of employment:** But the fact that a particular activity is forbidden by the employer may be evidence that that is not what the employee was hired to do at all, and thus was not for a business purpose. For instance, a custodian of a private swimming pool was told not to allow any unauthorized persons to swim; when he nonetheless granted such permission, his act was held to be outside the scope of employment, since he was hired for the purpose of keeping people out. *Gurley v. Southern Power Co.*, 90 S.E. 943 (N.C. 1916), cited in Prosser, p. 461, fn. 19.

4. **Unauthorized delegation by employee:** If the employee, without his employer's permission, ***hires an assistant***, or permits an unauthorized person to use the employer's property, and the latter commits a tort, the employer will ***not*** automatically be vicariously liable, in most courts. Rather, there will be vicarious liability only if the employee himself was negligent in bringing in the third person (as where he should have known that the third person would not be able to do the job safely).

Example: X, a truck driver for D grocery store, is instructed by his boss not to let anyone else drive the truck or even ride with him in it. Contrary to this instruction, he permits Y, a thirteen-year-old, to not only ride but also drive the truck. While Y is driving (and X is a passenger), Y negligently collides with P. *Held*, since D did not authorize X to let anyone else drive, D is liable only if X was himself negligent in either entrusting the truck to Y,

or in supervising his driving. The issue of X's negligence is for the jury. *Potter v. Golden Rule Grocery Co,* 84 S.W.2d 364 (Penn. 1935).

5. **Intentional torts:** *Respondeat superior* may, as noted, apply to intentional torts. Generally, ". . . the master is held liable for any intentional tort committed by the servant where its purpose, however misguided, is wholly or in part to further the master's business." Prosser, p. 464.

   a. **Debt collection:** Thus the employer will be liable if his employee attempts to ***collect a debt*** owed to the employer by assault, battery or false imprisonment.

   b. **Personal motives:** But if the employee acts purely from ***personal motives*** (e.g., a violent dislike of a customer), the employer will not be liable. Prosser, p. 465.

      i. **Special duty owed by employer:** But even in this "personal motive" situation, the employer may still be liable if he owes an independent duty of protection to the victim. We saw, for instance (*supra*, p. 159), that a common carrier owes its passengers a duty of reasonable care to protect them against torts by third persons. Therefore, if a railroad conductor attacked a passenger, even though solely for his own motives, the railroad would still be liable, on the grounds that it breached its direct duty of care. Prosser, p. 465.

   c. **Lost temper:** If the employee gets into an ***argument*** during a business transaction, and then loses his temper and commits an intentional tort, most courts hold that the employer is not liable. But a growing minority hold that such a tort really arises out of the employment, and that the employer is therefore liable. Prosser, p. 466.

   d. **Foreseeability rule:** Just as in the case of negligence, a few modern courts have adopted a "foreseeability rule", whereby the employer is liable even for intentional torts if their occurrence was foreseeable or "characteristic". For instance in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), a drunken Coast Guard sailor, while on his way back to his vessel, damaged the plaintiff's drydock by intentionally tampering with the machinery that controlled the water level. Despite the lack of evidence that the sailor was intending to serve the Coast Guard by his actions, his employer (the U.S.) was held liable. The court said that an employer should be liable for "accidents which may be said to be characteristic of its activities", and that this tort was "characteristic" in view of the "proclivity of seamen to find solace for solitude by copious resort to the bottle when ashore." See P,W&S, p. 683.

6. **Dangerous instrumentalities:** If the employer entrusts his employee with a ***"dangerous instrumentality"*** (e.g. dynamite, vicious animals, etc.) a few cases hold that he will be liable even if the employee goes out and uses the instrument for his own purposes. See Prosser, p. 466-7.

7. **Employer's own liability:** Keep in mind that in addition to the vicarious

liability being discussed here, the employer is also liable for his own direct negligence. It may for instance, be negligence on the part of the employer to hire an employee who the employer should realize is unfit and poses a risk to others. See P, W&S, p. 684.

III. INDEPENDENT CONTRACTORS

A. No general liability: One who hires an independent contractor is ***not*** generally liable for the torts of that person. Prosser, p. 468. However, there are a number of significant exceptions to the rule, discussed below.

1. **Distinguished from employee:** An independent contractor is one who, although hired by the employer to perform a certain job, is not under the employer's immediate control, and may do the work more or less in the manner he himself decides upon. See the discussion of the distinction between independent contractors and employees *supra*, p. 239.

B. Exceptions to non-liability: A number of the more important exceptions to the rule that an employer is not liable for the torts of his independent contractor are as follows:

1. **Employer's own liability:** First, if the employer is ***himself*** negligent in his own dealings with the independent contractor, this can give rise to employer liability. For instance, if he should know that the work to be done is hazardous if not done with special precautions, and he choses a contractor whom he knows or should know will not do the work safely, this is direct negligence on the part of the employer. See Rest. 2d, §411. Similarly, if he fails to inspect the work after it is done, he is liable for any injuries even though they result from the contractor's own negligence. Prosser, p. 469-70.

2. **Non-delegable duty:** There are some duties of care that are deemed so important that the person owing them will ***not be allowed to delegate*** them to anyone. In that event, if he hires an independent contractor, and the contractor fails to perform adequately, the employer will be vicariously liable. This has been held to be the case, for instance, of a city which has a duty to keep its streets in repair, and which hires a private company to do the work; many of the duties owed by landowners (e.g. the duty to keep the premises safe for business visitors) are also of this category.

   ★ **Example:** D, an automobile owner, hires X, a mechanic, to fix her brakes. He does the work negligently, and three months later, D is in an accident caused by the bad brakes. *Held*, D had a statutory duty to keep her brakes in "good working order". This duty was so important that it could not be delegated. If the duty is not performed adequately, there is a grave danger of harm. And D could (and probably did) buy liability insurance which could cover this liability, since the accident stemmed from her own driving activities. (The court also held, in a separate portion of the opinion, that D's statutory duty to keep the brakes in good order could be met by the use of "ordinary prudence." But since the contractor's acts are deemed to be those

of D due to the non-delegable nature of the duty, D did not even use such ordinary prudence, and is liable.) *Maloney v. Rath*, 445 P.2d 513 (Cal. 1968).

3. **Inherently dangerous activities:** One who employs an independent contractor will also be liable where the work is such that, unless ***special precautions*** are taken, there will be a ***high degree*** of danger to others. See Rest. 2d, §§416, 427. See also Prosser, pp. 472-4.

   a. **Dangerous despite precautions:** This rule first applied principally to work which was highly dangerous even if every possible precaution was taken (e.g. dynamiting). In this situation, the contractor himself would be "strictly liable" on the grounds that the activity is "ultra-hazardous" (see *infra*, p. 253). The employer, in turn, may be said to be "vicariously strictly liable", and he will have to pay for the damage even if the contractor has proceeded with due care. See Rest. 2d, §427A.

      i. **Safety precautions omitted:** But employer liability has also more and more frequently been applied where the work to be done by the independent contractor is not "ultra-hazardous" (i.e., it would be reasonably safe if performed with adequate precautions). In this situation, if the independent contractor omits the precautions, his negligence is attributed to the employer. For instance, if an independent contractor is hired to dig a sewer in the street, and he leaves the trench unguarded without warning lights at night, the person who hired him will be liable to a plaintiff who drives his car into the trench. Rest. 2d, §427, Illustr. 3.

      ii. **Unusual degree of risk:** But this special rule of vicarious liability only applies to ***"peculiar risks"***, i.e., risks "differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community." Rest. 2d, §416, Comment d. For instance, if a contractor is hired to transport goods by truck on the highway, and he drives negligently, this risk is not "peculiar", and the person who hired him will not be liable. Rest., *ibid.*

      iii. **Collateral negligence:** A corollary of the "inherently dangerous activities" exception is that where the contractor's negligence is "***collateral***" to the risk (i.e., not recognizable in advance as being particularly likely in view of the activity in question), the employer will not be liable for it. For instance, if the owner of a building hires an independent contractor to paint his windows, and he reasonably expects that the windows will be painted in place, he will not be liable when the contractor instead removes the windows from the building to paint them, and negligently drops one on the ground; this is so because such a risk is not inherent or foreseeable in the general activity of window painting. See Prosser, pp. 474-5.

4. **Liability to contractor's employees:** An "exception to the exceptions", in many jurisdictions, is that one who hires an independent contractor will not be

liable for negligent acts which injure the contractor's ***own employees***. Thus in *New Mexico Electric Service Co. v. Montanez*, 551 P.2d 634 (N.M. 1976), the owner of an oil well was held not to be vicariously liable where a contractor he had hired to do certain electrical work negligently failed to warn its employee of danger, leading to his injury. The court pointed out that had the oil well owner used his own employees, he would have been protected from suit by Workmen's Compensation Laws, and that it was unfair to subject him to greater liability for using an independent contractor to do the work.

a. **Restatement view:** The Second Restatement does not prevent an independent contractor's employees from suing the owner, although a special note to an early Tentative Draft contained such a restriction, which was later eliminated from the final draft. Rest. 2d, Tentative Draft No. 7, Special note to Chapter 15.

5. **Liability of physicians:** Prior to the widespread abolition of charitable immunity (see *supra*, p. 231), many courts held that a ***physician*** could be held vicariously liable for the negligence of hospital administrators, nurses, and even other surgeons, who were not under his employ, but who were theoretically subject to his right of control. This liability was imposed pursuant to what was often called the ***"borrowed servant rule"***, and was in large measure an attempt to find a solvent defendant where the hospital itself could not be sued because of its immunity. The doctrine has been abolished in many places, and strictly limited to the time of surgery in others. See P,W&S, p. 689.

IV. JOINT ENTERPRISE

A. Nature of joint enterprise relationship: Another relationship which may give rise to vicarious liability is that frequently called ***"joint enterprise"***. A joint enterprise is like a partnership, except that it is generally for a very short and specific purpose (e.g. a ***trip***). Once the various requirements for the existence of a joint enterprise are met, the negligence of one "joint enterpriser" (or "joint venturer" as he is sometimes called) is imputed to the other.

1. **Use in auto cases:** The doctrine almost always arises in ***automobile accident cases***, in which the negligence of the driver is imputed to the passenger (either to allow the occupant of a second car to recover against the passenger, or, under the doctrine of imputed contributory negligence, discussed *infra*, to prevent the passenger from recovering against the negligent driver of the other car.)

B. Requirements for joint enterprise: There are usually held to be four requirements for a joint enterprise: (1) an ***agreement***, express or implied, between the members; (2) a ***common purpose*** to be carried out by the members; (3) a ***common pecuniary interest*** in that purpose; and (4) an equal right to a ***voice*** in the enterprise, i.e., an equal ***right of control***. Rest. 2d, §491, Comment c. Most litigation has revolved around the third and fourth requirements.

1. **Pecuniary interest:** In courts requiring a common pecuniary interest, the result is that a mere ***social trip***, or a trip in which each member is pursuing his own ***independent business interest***, is not a joint enterprise.

★ **a. *Shoemaker* case:** Thus in *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10 (Tex. 1974), an airplane was piloted by one of its owners, and the several passengers included another co-owner as well as the plaintiff. The plane crashed due to the pilot's negligence. Because, at the time of the crash, the occupants were engaged in a voluntary Civil Air Patrol search mission, the court held that they had no common "business or pecuniary purpose", and that therefore, the co-owner/passenger was not involved in a joint venture with the negligent pilot/co-owner. The former was therefore not vicariously liable for the latter's negligence. (However, the court held, another of the requirements for the joint enterprise doctrine, that the parties have a mutual right of control, was met, even though only one was doing the actual piloting.)

b. Sharing expenses: The fact that two parties taking a social trip, or pursuing separate business interests while travelling together, ***share expenses*** of the trip, is not by itself enough to establish that they have a "common pecuniary or business purpose". Rest. 2d, §491, Comment i.

2. Mutual right of control: The requirement that each joint venturer have a partial right of control over the enterprise generally means, in the case of an automobile trip, that each must have some say in how the car is to be driven. Where the occupants of the car have the "common business" purpose referred to above, it is usually found that they have at least a theoretical right of control over the car as well. This does not mean that each has the right, at any time, to grab the wheel and steer; it simply means that each is understood to have something like an equal say in how fast the car will travel, what the route will be, etc. See *Howard v. Zimmerman*, 242 P. 131 (Kan. 1926).

a. Social purpose: But where only a social trip is involved, courts often find that the passenger has no right of control over the driver. (But see the *Shoemaker* case, *supra*, in which, even though there was no business purpose, the court held that the plane's passenger/co-owner had a theoretical right of control over the pilot/co-owner, i.e., a "right to be heard".)

b. Joint ownership: Many courts used to hold that the mere fact that the automobile was ***jointly owned*** (e.g. by a husband and wife) meant automatically that the passenger/co-owner had a right of control over the driver/owner. But this is no longer the rule. See Prosser, p. 479.

3. Passenger v. driver: Incredible as it may seem, a few courts have constructed, in effect, their own judicial "automobile guest statutes" by holding that where driver and passenger are joint venturers, the passenger may not sue the driver when the latter negligently causes a crash. The driver's negligence is said to be imputed to the passenger, who is then contributorily negligent and thus barred from recovery against the driver. This rule is on the wane. See Prosser, p. 480. (But the driver's negligence may still be imputed contributory negligence by the passenger in a suit against the driver of another vehicle, as discussed *infra*, p. 249).

V. BAILMENT AND AUTO CONSENT STATUTES

A. Searches for automobile liability: Courts have tried particularly hard to find a solvent defendant in car accident cases. In many states today, the legislature has taken care of the problem by so-called ***"automobile consent statutes"***, which make the owner of a car liable for the negligence of any person to whom use of the car is entrusted. (Such statutes are also often accompanied by compulsory liability insurance for all owners or drivers.) Apart from such consent statutes, however, a number of judge-made doctrines accomplish the same objective of making the car owner liable for the negligence of one he permitted to use the car. The most important of these is the ***"family purpose doctrine"***.

1. **Family purpose doctrine:** The family purpose doctrine, accepted at one time by about half of all American courts, and now probably by somewhat less than that, provides that a car owner who lets ***members of his household*** drive his car for their own personal use has done so in order to further a "family purpose" or family objective, and is therefore vicariously liable. (The doctrine is also sometimes called the "family car" rule.)

   Example: Father lets Son use the car. Son negligently smashes into P. In a state adopting the family purpose doctrine, Father will be vicariously liable for Son's negligence.

   a. **Co-ownership:** The doctrine has been held to apply even where the driver ***co-owns*** the vehicle with the defendant. In *Marcus v. Everett*, 239 N.W.2d 487 (Neb. 1976), a wife's negligence in driving was imputed to her husband by the doctrine, even though the wife was co-owner; the wife was, the court found, driving with her husband's consent, and for a family objective, despite the fact that she could have driven it without his consent.

   b. **Abandonment:** In states adopting consent statutes, discussed below, the family purpose doctrine is usually unnecessary, since the owner is liable for the negligence of whomever he allows to use the car, whether a member of his household or not, and whether there is a family objective or not. Thus in *McMartin v. Saemisch*, 116 N.W.2d 491 (Iowa 1962), the court abolished the doctrine (for imputed contributory negligence purposes as well) on the grounds that adoption of a local consent statute made it "outmoded".

B. Consent statutes: About one quarter of the states have enacted statutes, called "***automobile consent statutes***", which provide that the owner of an automobile is ***vicariously liable*** for any negligence committed by one using the car with the owner's ***permission***.

1. **Scope of consent:** Since the liability is based upon the "consent", if the use by the borrower (or "bailee" as he is usually called) goes clearly ***beyond*** the scope of that consent, there is no liability. For instance, if the owner expressly forbids the bailee to drive on the highway, such use would probably so exceed the scope of consent as to render the statute inapplicable.

2. **Use by sub-bailee:** If the bailee, without authorization by the owner, in turn

lends the car to a third person (here called a "sub-bailee"), is the owner liable for the sub-bailee's negligent driving? The decisions are divided, with courts somewhat more likely to find statutory liability where the bailee has remained in the car and merely turned the driving over to the sub-bailee. See Prosser, p. 487.

a. **Modern view:** The modern view is probably that favoring liability, ★ expressed in *Shuck v. Means*, 226 N.W.2d 285 (Minn. 1974). In *Shuck* the court held the defendant rent-a-car company liable when its customer allowed a third person to drive (apparently while the customer was not a passenger), in contravention of an express provision in the rental agreement.

3. **Contributory negligence imputed to owner:** A few courts have held that where a bailee drives a car with the owner's consent, any negligence by that bailee will be ***imputed*** to the owner, if the owner brings suit against a third-party-driver for damage to the owner's car. Most courts, however, have looked to the purpose of consent statutes (to ensure a financially responsible defendant), and have held that this rationale does not apply for purposes of imputed contributory negligence. Prosser, p. 487.

C. **Non-statutory bailment:** In the absence of a consent statute, the mere existence of a bailment does ***not*** make the bailor vicariously liable for the bailee's negligence.

1. **Negligence by bailor:** But the bailor may, of course, be negligent himself in entrusting a potentially dangerous instrument to the bailee where he should ★ know that the latter may use it unsafely. Thus in *Littles v. Avis Rent-A-Car System*, 248 A.2d 837 (Penn. 1969), the court found the defendant car rental company not liable for an accident caused by a twelve-foot-high rented van, which the customer drove into a less-than-twelve-foot overpass. The court relied on the fact that the defendant had no knowledge of its customer's lack of experience with such large vehicles. (But a dissent pointed out that the defendant knew that its customer had never driven anything larger than a pickup truck, and should therefore have been aware that the customer might get in an accident.)

D. **Automobile insurance omnibus clause:** The need for automobile consent statutes is eliminated, in many states, by the fact that the standard ***automobile liability insurance policy*** covers not only the named insured (usually the head of household, who is also generally the owner or co-owner of the automobile), but also any member of the named insured's household, and "any other person using such automobile with the permission of the named insured, providing his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission." (Quoted in K&K, p. 435.) The effect of this is to make the user of the car financially responsible himself, so that liability on the part of the owner is unnecessary (at least up to the policy limits)

VI. IMPUTED CONTRIBUTORY NEGLIGENCE

A. **Function of the doctrine:** If the situation is one which A may be vicariously liable for B's tortious act in an action brought by C, does it follow that B's contributory

negligence should be imputed to A when A sues C? The answer has traditionally been "yes". For instance, if Employee (while acting within the scope of his employment) and X negligently collide with each other, Employee's negligence will often be imputed to Employer so as to bar him from recovering in a suit for property damage against X.

B. **Expanded historical role:** Historically, there were several situations in which contributory negligence was "imputed" even where the relationship between the plaintiff and the contributorily negligent person was ***not*** one of those which would have made the former liable for the latter's torts.

1. **Driver and pasenger:** For instance, a driver's negligence was frequently imputed to his passenger, so as to prevent the passenger from recovering against the driver of another vehicle whose negligence contributed to the collision between the two cars. This result, one of the most scandalous in the history of tort law, has been politely summed up as having the result that ". . . of the three persons involved, the entire loss fell upon the only one who was himself free from all negligence." P,W&S, p. 702.

2. **Husband and wife:** Similarly, a husband's negligence was frequently imputed to his wife, and vice versa.

3. **Parent and child:** And a parent's negligence was imputed to his child. Thus a child hit by a speeding car might be denied recovery on the grounds that his parents were negligent in not supervising him, and their negligence was to be imputed to him.

C. **Modern rule:** But in the vast majority of states today, contributory negligence will be imputed ***only*** if the relationship is one which would make the plaintiff vicariously
★ liable if he were a defendant. See Rest. 2d §485. Thus in *Smalich v. Westfall*, 269 A.2d 476 (Penn. 1970), the court rejected the imputation of a driver's negligence to his passenger. The court noted that a passenger, even if he owns the car, generally has no ability to control the moment-to-moment carefulness of the driver, and should not be burdened with responsibility for the latter's negligence. (But a concurrence argued that contributory negligence should not be imputed even where there would be vicarious liability if the defendant were plaintiff; see *Weber v. Stokely-Van Camp*, *infra*, in which the majority took this position.)

1. **"Both ways test":** The converse of this rule is that if the relationship is one which would give rise to vicarious liability, contributory negligence ***must*** be imputed. This is known as the "***both ways***" rule. In general, it is fair to say that the "both ways" rule is alive. But there are several common situations in which contributory negligence is not imputed despite a relationship which would give rise to vicarious liability.

   a. **Family purpose doctrine:** Thus a number of courts refuse to apply the "family purpose" doctrine in cases where the automobile owner is the plaintiff, and a member of his household was contributorily neligent. See *McMartin v. Saemisch*, *supra*, p. 247.

b. **Consent statutes:** Similarly, most automobile consent statutes, as noted above, have not been used to impute the bailee's contributory negligene to the owner.

c. **General abandonment of test:** A few courts have gone so far as to reject the very principle of the "both ways" rule. For instance, in *Weber v. Stokely-Van Camp, Inc.*, 144 N.W.2d 540 (Minn. 1966), the court rejected the "both ways" rule with respect to the master-servant relationship, at least in automobile negligence cases. See also P,W&S, p. 704.

3. **Suit between master and servant:** Even in a jurisdiction where an employee's contributory negligence is imputed to his employer when the latter sues a third person, there will be no imputation in a suit that is merely by the employer against the employee. See P,W&S, p. 704.

STRICT LIABILITY

Introductory note: The liability we have seen thus far has been based either upon intent or upon negligence. We examine in this chapter certain situations, particularly those involving animals and abnormally dangerous activities, in which liability is imposed even where neither intent nor negligence is present. Such liability is sometimes called "liability without fault", or "absolute liability". However, the more commonly-accepted term, and the more descriptive one, is "strict liability".

As will be seen, the basis for strict liability is that those who engage in certain kinds of activities do so at their own peril, and must pay for any damage which results, even if the activity has been carried out in the most careful possible manner. Such activities, it is felt, should "pay their own way" since it is usually easier for the defendant to bear the loss (probably through liability insurance) than for the plaintiff to do so.

I. ANIMALS

A. Trespassing animals: The English common law rule has apparently always been that the owner of livestock or other animals is liable for property damage caused by them if they ***trespass*** upon another's land. This liability existed even though the owner exercised utmost care to prevent the animals from escaping. However, the rule applied only to animals of a sort likely to roam and do substantial damage. Thus cattle, horses, sheep and goats were included but "household" animals like dogs and cats were not. See P,W&S, p. 707.

1. **American rule:** In most American jurisdictions, this English rule of strict liability (with its exception for dogs and cats) applies. Prosser, pp. 496-7. This is particularly likely to be the rule in the populous eastern states.

   a. **Western states:** A number of western states, however, whose economy still depends on raising of livestock, have never adopted a broad rule of strict liability. "Fencing in" statutes in some states provide that an animal owner is not strictly liable if he attempts to fence in his animals, but that he is strictly liable if he does not. Conversely, "fencing out" statutes provide that if the plaintiff properly fences his land, he has a strict liability claim against one whose animals break in. Prosser, pp. 497-8.

   a. **Use of highway:** Even in the eastern states, if the defendant is using a ***public road*** to transport his animals to market, he will not be strictly liable if they wander onto the land immediately adjoining the road. Prosser, *ibid.*

B. Non-trespass liability: Strict liability also sometimes exists for damage other than trespass (e.g. personal injury). There is strict liability for harm done by ***"dangerous animals"*** kept by the defendant. But the definition of a "dangerous animal" depends in turn upon whether the animal is of a species that is regarded as "wild" or "domesticated".

1. **Wild animals:** A person who keeps a ***"wild"*** animal is strictly liable for ***all damage*** done by it, provided that the damage results from a ***"dangerous propensity"*** that is typical of the species in question (or stems from a dangerous tendency of the particular animal in question of which the owner is or should be aware). Rest. 2d, §507.

   ★ **Example:** D maintains a private "monkey farm", to which the public is sold admission tickets. P, a two-year-old, is feeding one of the monkeys (as D's employees encourage him to do), when it severely bites his arm. *Held*, D is strictly liable for injuries caused by a wild animal, such as the monkey. The fact that D may have exercised the utmost care to prevent such injuries is irrelevant. This conclusion is buttressed by the fact that a state statute imposes strict liability on dog owners. *Isaacs v. Powell*, 267 So.2d 864 (Fla. 1972).

   a. **Domestic animals:** But injuries caused by a ***"domestic"*** animal such as a cat, dog, cow, pig, etc., do not give rise to strict liability, except where the owner has ***prior knowledge*** (*scienter*) of the animal's dangerous characteristics. This does not mean that "every dog is entitled to one free bite", an often-repeated incorrect statement. For an owner may have reason to know of his pet's dangerous tendencies because it has ***unsuccessfully*** attempted to bite someone in the past, or seems to have a generally vicious temperament, etc. See Prosser, pp. 501-2.

      Example: A boar hog escapes from D's farm, and attacks P, a neighboring farmowner. There is no evidence that the boar has ever actually attacked anyone before P, but there is evidence that D "knew the bugger was mean". *Held*, D is strictly liable. *Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974).

   b. **Distinguishing wild from domesticated:** A domesticated species is one which "is by custom devoted to the service of mankind" in the community in question. Rest. 2d, §506(2). Thus bees, bulls, and stallions are all generally held to be domesticated, even though they can be and often are very dangerous. The basis for this classification is obviously that ownership of these animals serves a social use, and should not be discouraged by excessive liability. Prosser, p. 500.

C. **Defenses:** The defenses which may be asserted in an action based on strict liability for animals are discussed *infra*, p. 256, in the general treatment of strict liability defenses.

II. ABNORMALLY DANGEROUS ACTIVITIES

A. **The doctrine of *Rylands v. Fletcher*:** The path to strict liability for ***"abnormally*** ★ ***dangerous"*** activities was begun in the English case of ***Rylands v. Fletcher***, L.R. 3 H.L. 330 (1868).

1. **Facts of *Rylands*:** The defendants hired an independent contractor to construct a reservoir on their property. When the reservoir was filled up, water broke

through from it into some abandoned mine shafts on the property, and then flooded into adjacent mine shafts owned by the plaintiffs. The defendants themselves were not aware of the abandoned shaft, and were therefore not negligent (although the contractor probably was).

2. **Lower holding:** After the lowest court denied liability, the case came before the Exchequer Chamber, in effect an intermediate appeals court. The court reversed, holding that there was liability because ". . . the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." The court analogized to the rules conferring strict liability for trespassing cattle (see *supra*, p. 251).

3. **House of Lords:** The case then went to the House of Lords, the final appellate tribunal. The holding of the Exchequer Chamber was affirmed, but was significantly cut back. Liability existed because, the court said, the defendants put their land to a "***non-natural*** use for the purpose of introducing [onto it] that which in its natural condition was not in or upon it", i.e., a large quantity of water. If, on the other hand, the court said, the water had entered during a "natural use" of the land, and had then flowed off onto the plaintiff's land, there would have been no liabilty.

B. America's slow adoption: During the first years after *Rylands*, American courts frequently misconstrued it and purported to reject it. They focused on the Exchequer Chamber version, which would have imposed liability for escaping forces even where the land is put to a natural use. Prosser, pp. 508-9. Eventually, however, the vast majority of American courts accepted at least the practical result of *Rylands*, even if not the case by name. Prosser, p. 509. The rule has in fact been extended to include most activities that are extremely dangerous. Following are several such applications:

Example: D, a municipality, deliberately adopts a policy of burying water mains six feet underground, and leaving them there until they start leaking; this policy reduces maintenance costs. One of the mains breaks, flooding P's property. *Held*, D must bear the cost of the damage, since it has reaped the benefits of this deliberate policy of waiting until leaks develop. Whether this is called an application of *Rylands v. Fletcher*, or a trespass, or negligence per se, does not matter. *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1965).

★ **Example:** D, an exterminator, puts hydrocyanic acid gas in the basement of a commercial building one midnight, in order to kill cockroaches. The next morning, P, walking in the lobby, is almost fatally poisoned by the gas. *Held*, D's activity was "ultra-hazardous", and was not a matter of "common usage" (even though it may be common among exterminators). Therefore strict liability applies, and D must pay even though he may have exercised all due care. *Luthringer v. Moore,* 190 P.2d 1 (Cal. 1948).

Example: A tractor-trailer, owned by D1 and driven by D2, is carrying a

large quantity of gasoline. Apparently without negligence on the part of either defendant, the trailer portion disengages, leaves the highway, and falls onto a road below. Thousands of gallons of gasoline spill out onto that road, and when P drives into them, a fatal explosion and fire ensue. *Held*, the doctrine of *Rylands v. Fletcher* applies, and the defendants are strictly liable. The transportation of gasoline by truck is "obviously an activity involving a high degree of risk", which "cannot be eliminated by the exercise of reasonable care."

A concurring opinion also pointed out that a commercial transporter "can spread the loss among his customers — who benefit from this extrahazardous use of the highways". *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1973).

Note: *Siegler* is one of the comparatively few American cases finding strict liability where the activity cannot really be said to be "non-natural" or "unusual". The majority relied on the Exchequer Chamber holding in *Rylands*, which, as noted, did not make any distinction between natural and non-natural uses.

C. Restatement rule: The Second Restatement has, roughly speaking, codified the rule of *Rylands v. Fletcher*, to impose strict liability in cases of ***"abnormally dangerous"*** activities. Rest. 2d, §519.

1. Various factors: Rest. 2d, §520, lists six factors to be considered in determing whether an activity is "abnormally dangerous":

a. High degree of risk: "Existence of a high degree of risk of some harm to the person, land or chattels of others";

b. Risk of serious harm: "Likelihood that the harm that results from it will be great";

c. Cannot be eliminated even by due care: "Inability to eliminate the risk by the exercise of reasonable care";

d. Not a matter of common usage: "Extent to which the activity is not a matter of common usage";

e. Appropriateness: "Inappropriateness of the activity to the place where it is carried on"; and

f. Value: "Extent to which its value to the community is outweighed by its dangerous attributes."

2. Requirement of unavoidable danger: The requirement that the activity be one which ***cannot be carried out safely***, even with reasonable care, was ★ illustrated in *Beck v. Bel Air Properties, Inc.*, 286 P.2d 503 (Cal. App. 1955). The defendant in *Beck* build a subdivision on top of a canyon, and constructed landfills on the side of the slope in doing so. Experts from both sides had testified as to correct methods of doing such fills, and it was clear that when the best methods were used, there was little risk of the erosion and landslide which led to the suit. The court held that there was no strict liability.

a. **Nuclear reactor:** One kind of activity which would almost definitely be held to fulfill the "unavoidable danger" requirement is the running of a ***nuclear reactor***. Thus early suits filed in the wake of Three-Mile-Island seek, inter alia, strict liability recovery. However, Federal statutes impose a maximum total liability for a single "nuclear incident" of $560,000,000. See 42 U.S.C.A. §2210(e).

3. **Airplane accidents:** There has been much controversy about the extent to which strict liability should be applied in cases of ***airplane accidents***.

   a. **Suit by passenger against carrier:** In suits by passengers (or their estates) against the airlines, courts have almost always held that there is ***no strict liability***. It is therefore necessary for the plaintiff to show negligence, either on the part of the pilot, the maintenance crew, the manufacturer, etc.

      i. **International flights:** Liability for international flights is governed by the Warsaw Convention, which limits the carrier's liability to its own passengers to $8,300. A 1966 Montreal agreement modifies the Convention, in cases of carriers operating in the U.S., to raise the limit to $75,000, and to impose a modified form of strict liability. See G,K&E, p. 506.

   b. **Ground damage:** For no apparent logical reason, strict liability ***does apply to ground damage*** caused by an airplane crash, according to decisions or statutes in most states. See, e.g., Rest. 2d, §520A, making both the pilot and owner of the airplane strictly liable for ground damage caused by the "ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft".

      i. **Abnormally dangerous activity:** It is hard to see how airplane travel is "abnormally dangerous", since for at least the last thirty years, there have been more fatalities per passenger mile in car traffic than airplane traffic. The Restatement relies on the fact that only a small number of people actually pilot airplanes, and the fact that no one can situate his house or other property in a place where there is no danger of falling aircraft, something which is not true of automobile traffic. Rest. 2d, §520A, Comments c and d.

      ii. **Minority view:** But a growing minority of states appear to be abandoning strict liability for ground damage. See Prosser, p. 513-6.

4. **Value to community:** One of the factors suggested by the Restatement as working against a finding that an activity is abnormally dangerous is that it has ***"value to the community"***. Thus in most parts of states such as Texas and Oklahoma, the reliance on the energy industry is sufficiently great that there is usually no strict liability for accidents arising out of oil and gas wells, (The "inappropriateness of the activity to the place where it is carried on", another Restatement factor, also leads to this result.)

   a. **Not dispositive:** But "value to the community" is not dispositive, and an extremely valuable enterprise may nonetheless have to "pay its own way" if

the dangers created by it are sufficiently great. Thus in *Cities Service Co. v.*
★ *State*, 312 So.2d 799 (Fla. App. 1975), the defendant maintained a "settling pond" filled with billions of gallons of phosphate slimes, produced in connection with its phosphate mine. A wall of the pond burst, sending a billion gallons of slime in the rivers of P (the state of Florida). Despite the fact that the mine was of great economic importance to the community and the world, the fact that the land was suited for this purpose, and the fact that the ponds were necessary for the mine, the court pointed to the "magnitude of the activity and the attendant risk of enormous damage", and imposed strict liability.

III. LIMITATIONS ON STRICT LIABILITY

A. Limitations generally: Despite the fact that the liability is "strict", the plaintiff does not win his case merely by showing that injury resulted from an abnormally dangerous activity or dangerous animal. One set of limitations on strict liability corresponds to the "proximate cause" limitation on negligence actions. Another set relates to the plaintiff's activites. Most of the discussion below relates to abnormally dangerous activities, though similar principles apply to dangerous animals.

B. Scope of risk: Generally, there will be strict liability only for damage which results from the ***kind of risk*** that made the activity abnormally dangerous. For instance, even though it may be an abnormally dangerous activity to transport dynamite by truck through city streets, a pedestrian run over by such a truck will not be able to claim strict liability, since the risk of hitting pedestrians is not one of the things which makes such transportation abnormally dangerous. Rest. 2d, §519, Comment e.

1. **Abnormally sensitive activity by plaintiff:** A related rule is that the defendant will not be liable for his abnormally dangerous activities if the harm would not have occurred except for the fact that the plaintiff conducts an ***"abnormally sensitive"*** activity. Rest. 2d, §524A.

   ★ **Example:** D conducts blasting operations, which frighten female mink owned by P, who kill their young in reaction to their fright. *Held*, D is not strictly liable. The thing that makes blasting operations unusually dangerous is "the risk that property or persons may be damaged or injured by coming into direct contact with flying debris, or by being directly affected by vibrations of the earth or concussions of the air." Here, since P's mink ranch was more than two miles away from the blasting, and there was no unreasonable interference with any other landowners at that distance, the "exceedingly nervous disposition of mink" must be held responsible for the damage, not the blast itself. Strict liability does not protect against "harms incident to the plaintiff's extraordinary and unusual use of land." *Foster v. Preston Mill Co.*, 268 P.2d 645 (Wash. 1954).

2. **Manner in which harm occurs:** In the context of negligence, we saw (*supra*, p. 128) that where the harm which occurs is the kind the danger of which made the defendant's conduct negligent, but that harm occurs in an ***unforeseeable***

manner, the defendant will generally not be released from liability. But in cases of strict liability, this does not seem to be the case: The defendant will usually be relieved of liability if an unforeseeable cause intervenes, even though the damage is of the same nature as that which made the activity extraordinarily dangerous.

a. **Act of God:** Thus the intervention of an"***Act of God***" is often enough to relieve the defendant of strict liability. For instance, in *Rylands v. Fletcher* itself, the opinion in the Exchequer Chamber stated that the defendant could escape liability by showing that the accident occurred because of "*vis major*, or the act of God" (e.g. a storm of unprecedented severity). So also in *Golden v. Amory*, 109 N.E.2d 131 (Mass. 1952), the defendant dammed up waters, which escaped onto the plaintiff's land in a hurricane; the court denied strict liability because the flood was "plainly beyond the capacity of anyone to anticipate. . . ."

a. **Restatement view:** But the Second Restatement rejects the "Act of God" exception, as well as any exception for harm caused by the "innocent, negligent or reckless conduct of a third person" (assuming that the harm is of the sort that makes the activity abnormally dangerous). Rest. 2d, §522.

3. **Scope of liability compared with negligence cases:** In summary, most jurisdictions seem to impose liability for a narrower range of consequences in cases involving strict liability, than in cases involving negligence. See Prosser, p. 517. (And as previously noted, the scope of liability in negligence is generally narrower than that where an intentional tort is concerned; see *supra*, p. 9). But the Restatement view referred to above would impose liability for at least as broad a range of consequences as in negligence cases.

B. **Plaintiff's contributory negligence no defense:** Ordinary ***contributory negligence*** by the plaintiff will usually not bar him from strict liability recovery. This is certainly true in those situations where the plaintiff's contributory negligence consists of being ***inattentive***, and not discovering a risk which he should have discovered. In such a situation, the courts simply make a policy decision to place "the full responsibility for preventing the harm resulting from abnormally dangerous activities upon the person who has subjected others to the abnormal risk." Rest. 2d, §524, Comment a.)

1. **Unreasonable assumption of risk:** But if the plaintiff ***knowingly, voluntarily*** and ***unreasonably*** subjects himself to the danger, this will be a defense even to strict liability. Here, the plaintiff's conduct is that variety of contributory negligence which is also ***assumption of risk***; see *supra*, p. 218.

Example: Driver sees signs warning him that blasting operations will take place ahead, and that he should take a detour. He nonetheless voluntarily (and unreasonably) decides not to take the detour and is injured by the blast. His voluntary and unreasonable assumption of the risk bars him from recovery. But if he had merely been inattentive, and had missed the sign, this ignorant contributory negligence would not have been a bar. See Rest. 2d, §524, Comment b.

a. **Animals:** The same rule applies to one who is injured by a ***dangerous animal***. ★ Thus in *Sandy v. Bushey*, 128 A. 513 (Me. 1925), the plaintiff, walking with his horse in a pasture, was kicked by the defendant's horse. It was held that the latter's approach was "silent and swift and his attack unexpected." Therefore, any carelessness on the part of the plaintiff was no defense; but if the plaintiff had "unnecessarily and voluntarily [put] himself in a way to be hurt knowing the probable consequences of his act", this would have been a defense.

2. **Assumption of risk:** As just noted, that brand of contributory negligence which is also assumption of risk (i.e., an unreasonable assumption of danger) bars the plaintiff from recovery. Beyond this, assumption of risk which is ***reasonable*** will nonetheless ***also bar*** the plaintiff. For instance, "A plaintiff who accepts employment driving a tank truck full of nitroglycerin, with knowledge of the danger, must be taken to assume the risk when he is injured by an explosion." Rest. 2d, §523, Comment d.

PRODUCTS LIABILITY

Introductory note: "Products liability" refers to the liability of a seller of a chattel which, because of a defect, causes injury (usually personal) to its purchaser, user, or sometimes, a bystander. Although the term is sometimes used to refer only to liability in situations where the plaintiff did not purchase the item directly from the defendant (see, e.g., P,W&S, p. 738), here we use the term to include also cases where there is a direct contractual relationship between plaintiff and defendant.

The liability can be based upon any of three principal theories: (1) negligence; (2) warranty; and (3) "strict tort liability". The liability has generally been extended not only to the manufacturer of the defective product, but also to anyone in the business of selling such goods. In fact, products liability is easily the fastest-growing, and probably now nearly the most economically significant, branch of tort law.

I. NEGLIGENCE

A. Negligence and privity: There is no reason why the general principles of negligence, discussed previously, could not apply in a case in which personal injury has been caused by a carelessly manufactured product. Historically, however, the use of negligence theory for such purposes was drastically limited by the requirement of ***privity***, i.e., the requirement that, in order to maintain an action, the plaintiff must show that he contracted ***directly*** with the defendant.

1. ***Winterbottom v. Wright*:** The privity requirement stems from an 1842 English case, ***Winterbottom v. Wright***, 152 Eng.Rep. 402. In *Winterbottom*, the driver of a mail coach was injured when the coach broke down due to a lack of repair. He sued the defendant, who had contracted with the post office to keep the coach in good condition. The court held that since the defendant's original duty of repair arose out of a contract, that duty extended only to the other contracting party (the post office). Since the plaintiff never contracted with the defendant, his lack of privity meant that he could not recover, ***either in contract or tort***.

B. Historical development: During the seventy years following *Winterbottom*, the courts modified that rule to permit negligence suits without privity where personal injury occurred from an "inherently dangerous" defective product. A consumer who was made sick by contaminated food, for instance, could sue the manufacturer, even though he had made his purchase from a retailer; the food was said to be "inherently" or "imminently" dangerous.

1. ***MacPherson v. Buick:*** Determining whether a product was "inherently dangerous", however, was difficult and uncertain. In 1916, Judge Cardozo rejected the "inherent danger" requirement in negligence actions, in the ★ landmark case of ***MacPherson v. Buick Motor Co.***, 111 N.E. 1050 (N.Y. 1916).

a. **Facts of *MacPherson:*** The defendant in *MacPherson*, Buick Motor Co., made a car which it sold to a retail dealer. The dealer in turn sold it to the plaintiff. Due to defective spokes in one of the wheels, the car collapsed and injured the plaintiff. Although Buick had purchased the wheel from someone else, there was evidence that Buick could have discovered the defect by reasonable inspection.

b. **Holding:** Judge Cardozo held that the plaintiff could recover for negligence, despite the fact that he was not in privity with the defendant. His right of recovery arose out of tort law imposed by the court, not out of contract. Furthermore, it was not necessary for the plaintiff to show that cars are in general "inherently dangerous". Instead, the test should be whether the product was "reasonably certain to place life and limb in peril when negligently made. . . ." If so, a negligence action may be brought even without privity.

c. **Significance:** *MacPherson* thus established the general principle that once the plaintiff shows that the product will be unreasonably dangerous ***if defective***, he may sue in negligence without privity. The effect of this holding was virtually to abolish the rule of *Winterbottom* in a case where a negligently made product caused personal injury.

2. **Acceptance of *MacPherson*: *Every state*** has now accepted *MacPherson*. It is therefore universally the rule that ***one who negligently manufactures a product*** is liable for ***any personal injuries proximately caused by his negligence.*** See Rest. 2d, §395.

a. **Property damage:** Furthermore, most courts now allow negligence recovery where it is only ***property damage***, not personal injury, which results. See Prosser, p. 643.

b. **Economic harm:** However, if the plaintiff suffers ***only economic harm*** (e.g., lost profits suffered because a defective machine does not work), the courts are split as to whether he may recover for this harm from a remote seller. The subject is discussed more extensively *infra*, p. 292.

c. **Bystanders:** Where the plaintiff is a ***casual bystander*** (as opposed to a purchaser or other user of the product), he can recover in negligence if he can show that he was a "***foreseeable plaintiff***". For instance, a pedestrian who is injured when a defectively made automobile crashes into him could recover if can show the manufacturer's negligence, since it is reasonably foreseeable that a defective automobile may injure a pedestrian. Liability to bystanders, not only in negligence but on the other theories of recovery, is discussed *infra*, p. 286.

C. **Classes of defendants:** Not only manufacturers, but also ***retailers, bailors,*** and other suppliers may have negligence liability.

1. **Manufacturers:** The manufacturer is of course the person in the distribution chain most likely to have been negligent. His duty of due care includes the following aspects:

a. **Design:** The obligation to use due care to ***design*** the product in a reasonably safe way (see *infra*, p. 278);

b. **Manufacture:** The duty to set up reasonably error-free ***manufacturing procedures***;

c. **Inspection and testing:** The duty to perform reasonable ***inspections*** and ***tests*** of the finished products;

d. **Packaging and shipping:** The duty to ***package*** and ***ship*** the product in a reasonably safe way. See generally, Rest. 2d, §395, Comments e and f.

e. **Assembly of parts made by another:** If the final "maker" of the product produces it by assembling ***components*** made by others, he may be negligent if he does not take reasonable care to obtain them from a reliable source. Also, he probably has an obligation to make a ***reasonable inspection*** of the components (or at least samples) before he incorporates them. See Rest. 2d, §395, Comment g.

i. **Vicarious liability:** Furthermore, some courts have made the assembler ***vicariously liable*** for negligence by his suppliers. For instance, in *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963), Ford was held liable for a defective part negligently supplied by another manufacturer, even though Ford could not have discovered the defect by reasonable care.

f. **Manufacturer of component assembled by another:** Conversely, the ***component-part manufacturer*** will be liable if he fails to use reasonable care to design a safe product, even though that product is not sold directly to the public, but is instead incorporated into a larger unit. See the discussion of component parts manufacturers *infra*, p. 288.

2. **Third person's failure to inspect:** Suppose the manufacturer negligently makes the product, and someone further along in the distribution chain (e.g. the retailer) has an obligation to inspect the product, and fails to do so adequately. Does this negligence in inspection let the manufacturer off the hook? The answer is almost always "no". Thus a car maker which tried to absolve itself of liability for negligent manufacture on the grounds that its dealer had the duty to make a final inspection for obvious defects would lose; see *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964). See Rest. 2d, §396; see also *supra*, p. 141.

a. **Effect on manufacturer's liability:** Although the mere failure of the retailer to make an inspection (even one he is obliged to make) will not by itself relieve the manufacturer of liability, if the retailer ***does*** make such an inspection and learns of a defect, or actually learns of a danger though some other means, and fails to warn the customer, many courts hold that this conduct is so gross that it ***breaks the chain of causation***, and absolves the manufacturer of liability. See, e.g., *McLaughlin v. Mine Safety Appliance Co., supra*, p. 135.

3. **Retailers:** A retailer who merely resells the product manufactured by another is

much less likely than the manufacturer to be successfully charged with negligence. The mere fact that he has sold a negligently manufactured or designed product is not by itself enough to show that he failed to use due care, since he may have had no duty to inspect, or even if he had, no chance of finding the defect. For this reason, ***suits against retailers are now generally brought on warranty*** (*infra*, p. 262) or ***strict liability*** (*infra*, p. 271) theories, rather than negligence. There are, nonetheless, a few situations in which the retailer may be negligent.

a. **Reason to know of danger:** If the retailer knows, or should know, that the product is unreasonably dangerous, he is negligent if he does not at least ***warn*** his customers. Rest. 2d, §401.

b. **Duty to inspect:** In the absence of a particular reason to believe that the product may be dangerous, the retailer ordinarily has ***no duty to inspect*** the goods. Rest. 2d, §402. This is true even if there is a defect which ***could have been discovered*** by a very simple and superficial examination.

i. **Minority view:** But a minority of courts impose on the retailer a duty to make at least such a simple superficial examination, and if he does not do so, he is liable in negligence for any defect which he would have discovered. See Pr. L. Nut., pp. 8-9. This is particularly likely to be the case where the retailer is a ***car dealer*** (either of new or used cars), where the effect of a defect is likely to be severe, and the retailer is likely to have much greater expertise in inspection than the buyer. Pr. L. Nut. pp. 10-11.

4. **Other suppliers:** Other classes of defendants may also have negligence liability. For instance, bailors of real property (e.g., rent-a-car companies), sellers and lessors of real estate, and suppliers of services (e.g., blood transfusions) may all be negligent. The general products liability status of these persons (including their status under warranty and strict liability theories) is discussed *infra*, p. 287.

II. WARRANTY

A. Historical importance of warranty: Historically, a purchaser of goods has always been able to sue his immediate seller on the grounds that the goods were not as they were contracted to be. Such an action was generally brought under the name "breach of warranty". If the buyer could show that the seller made representations, or warranties, either expressly or implicitly, about the quality of the goods, and that these representations turned out to have been false, the buyer could win, ***even in the absence of negligence*** on the part of the seller. Thus the fact that the seller reasonably and honestly believed his representations to be true, and in fact could not possibly have discovered the defects in the product, was irrelevant; furthermore, the fact that the defects were due to someone else's negligence (or to no one's negligence at all) was also irrelevant.

1. **Hybrid between tort and contract:** Since warranties arose, at common law,

only in situations where there had been an actual contract of sale, the action had many contract law aspects to it. For instance, the contract statute of limitations usually applied, as did the contract measure of damages (including damages for purely economic loss, which was not true in negligence actions).

2. **Tort aspects:** But certain aspects of tort law have also been grafted onto warranty law. Perhas the most notable instance of this is the tendency of the last twenty years to dispense, partially or completely, with the requirement of ***privity***. As is discussed below, many if not most states today allow a suit for breach of warranty to be brought against the seller by one other than the person who made the immediate purchase from that seller.

3. **Confused state of the law:** Warranty law is made even more confused by the fact that the Uniform Commercial Code (UCC), in effect in every state except Louisiana, attempts to deal statutorily with warranties. Yet the case law of warranty has gone its own way, often ignoring the UCC statutory language.

4. **Scope of discussion:** The treatment of warranty which follows addresses primarily the rules of the UCC. However, where case law has departed from the UCC, these departures are indicated.

5. **Express v. implied warranties:** There are two general sorts of warranties, "express" and "implied" ones. Because the rules governing the two classes differ in important respects, they are treated separately.

B. **Express warranties:** A seller may ***expressly represent*** that his goods have certain qualities. If the goods turn out not to have these qualilties, the purchaser (or, possibly, other affected persons — see the discussion of privity below) may sue for this breach of warranty.

★ **Example:** P buys a Model A Ford from St. John Motors, a Ford dealer. Before the sale, Ford had given its dealers brochures, one of which describes the Model A's windshield as "Triplex, shatter-proof glass . . . So made that it will not fly or shatter under the hardest impact." While P is driving the car, a pebble hits the windshield, making the glass shatter, in turn damaging P's eyes. *Held*, Ford expressly warranted that the glass was shatter-proof, and P had a right to rely on these representations, particularly since their falsity was not readily apparent. Furthermore, P may recover from Ford for breach of the warranty even though he purchased not from Ford, but from a dealer. *Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932).

1. **UCC version:** The UCC section governing express warranties is §2-313. It provides that an express warranty may be produced by an "***affirmation of fact or promise***" about the goods, by a ***description of the goods*** (e.g., "shatter-proof glass"), or by the use of a ***sample or model*** (e.g., a TV store's use of a floor model would be an express warranty to a customer that any set of the same model has the same general characteristics).

   a. **Reliance:** Under original common law warranty theory, the plaintiff had to show that he actually ***relied*** on the warranty. But the UCC, and most

modern non-UCC case law, have watered down this requirement; under UCC §2-313 the only requirement is that the warranty be "part of the basis of the bargain".

b. **Privity:** Persons not in privity with the defendant-seller, may recover for breach of express warranty. In order to do so, it is probably not necessary for the non-privity plaintiff to show that ***he himself*** was even aware of the express warranty. But it may be necessary for him to show that the person who purchased the goods from the defendant was at least aware of the warranty, although not necessarily that he relied on it. See Pr. L. Nut., pp. 30-1.

i. **Representation expected to reach plaintiff:** Some courts hold that a plaintiff not in privity with the seller must be at least a member of a class that the seller ***intended to reach*** with his express warranty. For instance, if the defendant could show that he made the warranty to a particular purchaser, in response to the purchaser's own needs, and that there was no expectation that the product would ever be re-sold, the second buyer would not be protected.

ii. **Warranties to public:** But many express warranties (e.g. the warranty of shatter-proofness in *Baxter*) would probably be held to be addressed to the public at large, and a remote buyer, user, or even passer-by, might be held to be part of the general class to which the warranty was addressed. See, e.g., *Connolly v. Hagi*, 188 A.2d 884 (Conn. 1963), in which a gas station employee doing work on an automobile was held to be protected by the manufacturer's express warranties as to the car's safety.

2. **Strict liability:** Observe that a defendant's liability for breach of an express warranty is in reality a kind of ***strict liability***, i.e. liability without regard to fault. As long as the plaintiff can show that the representation was not in fact true, it does not matter that the defendant reasonably believed it to be true, or even that he could not possibly have known that it was untrue.

Example: D, a drug company, manufactures a pain-killing drug called "Talwin." At the time of initial sales, the company reasonably believed that the drug was non-addictive, and it mentioned the non-addictiveness in the medical literature on the drug which it sent to doctors. A doctor prescribed the drug to P, who did in fact develop an addiction to it, which led ultimately to his death. *Held*, the fact that D's belief in the non-addictiveness of the drug was reasonable in the light of the medical knowledge at that time, is irrelevant. "Whatever the danger and state of medical knowledge, and however rare the susceptibility of the user, when the drug company positively and specifically represents its product to be free and safe from all dangers of addiction, and when the treating physician relies upon that representation, the drug company is liable when the representation proves to be false and harm results." *Crocker v. Winthrop Laboratories*, 514 S.W.2d 249 (Tex. 1974).

3. **Restatement "negligent misrepresentation" claim:** The Second Restatement establishes a tort action that is quite similar to a breach of express warranty claim. §402B imposes strict liability on a seller who "makes to the public a misrepresentation of a material fact" about the product.

C. **Implied warranty:** The existence of a warranty as to the quality of goods can also be ***implied*** from the fact that the seller has offered the good for sale.

1. **Warranty of merchantability:** The UCC imposes several implied warranties as a matter of law. The most important of these is the ***warranty of merchantability***. §2-314 (1) provides that ". . . a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."

a. **Meaning of "merchantable":** The Code offers no simple explanation of what makes goods "merchantable". But one of the factors listed by §2-314(2) is that to be merchantable, the goods must be "***fit for the ordinary purposes for which such goods are used.***" For instance, a car which, because of manufacturing defects, has a steering wheel that does not work, is clearly not "merchantable", since it is not fit for the ordinary purpose (driving) for which cars are used.

i. **Packaging:** To be merchantable, the goods must also be "adequately contained, packaged, and labeled. . . ." (§2-314(2)(e)). And they must conform to any "promises or affirmations of fact" that are made on the label (§2-3143(2)(f)). (If they do not, this would also be a breach of express warranty, as discussed above.)

b. **Requirement that seller be a "merchant":** The implied warranty of merchantability arises, under the Code, only if the seller is a ***"merchant with respect to goods of that kind".*** This requirement imposes two important practical limitations:

i. **Requirement of businessmen:** First of all, the seller must be, in effect, a businessman.

ii. **Regular sale of that kind of goods:** Second, he must regularly sell the kind of goods in question. Thus a businessman who is selling a piece of equipment which he once used but no longer needs makes no implied warranty of its merchantability, since he does not regularly deal in that kind of machine.

c. **Used goods:** It is not clear whether there can ever be an implied warranty of merchantability for ***used goods***, even if the seller deals in goods of that kind (e.g., a used car lot). Liability of such used goods dealers, including possible strict liability, is discussed *infra*, p. 287.

d. **Food and drink:** The UCC merchantability warranty applies explicitly to "the serving for value of food or drink to be consumed either on the premises or elsewhere". §2-314(1).

e. **Services:** But the Code itself does not apply to ***services***, real estate

transactions, or bailments. Some courts have applied portions of warranty theory to such transactions by analogy; this is discussed *infra*, p. 289.

f. **Retailers:** A retailer who did not manufacture the product is nonetheless held to have impliedly warranted its merchantability, simply because he has sold it (assuming that he deals in goods of that kind).

i. **"Sealed container" doctrine:** However, a few jurisdictions have carved out an exception to the Code, known as the "***sealed container" doctrine***. That doctrine provides that a retailer who resells a "sealed container" does not warrant the merchantability of the contents. This is usually justified on the grounds that the retailer has no ability to inspect; but since warranty liability is not based on failure to inspect or other fault anyway, it is hard to see how this exception makes sense. Georgia, Mississippi and Tennessee are among the states applying the doctrine. Pr. L. Nut., pp. 25-7.

2. **Warranty of fitness for a particular purpose:** A seller may also implicitly warrant that the goods are "***fit for a particular purpose***". This warranty arises, under UCC §2-315, when the seller knows that the buyer wants the goods for a particular (and not customary) purpose, and the buyer ***relies on the seller's judgment*** to recommend a suitable product. The warranty is that the goods are in fact suitable for that special purpose.

Example: Consumer tells Shoe Dealer that he wants a pair of shoes for mountain climbing. Dealer recommends Brand X, on the grounds that they have good traction. If the shoes turn out not to have good traction, and Consumer falls, he can sue Dealer for breach of the implied warranty of fitness for a particular purpose.

3. **Privity:** Breach of warranty, as noted, started out as basically a contract action. Courts were therefore reluctant to permit a plaintiff to recover for breach of implied warranty against a manufacturer, or other person within the distributive chain, with whom the plaintiff had not directly contracted.

a. **Food cases:** However, as with negligence actions, courts developed exceptions to the privity requirement. For instance, in cases of defective food, the manufacturer was held to impliedly warrant that his products were of reasonable quality, and this warranty "ran with the goods", so that anyone who consumed them could sue. See, e.g., *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913).

★ b. ***Henningsen v. Bloomfield Motors, Inc*:** Then in 1960, the case of ***Henningsen v. Bloomfield Motors, Inc.***, 161 A.2d 69 (N.J. 1960) drastically restricted the privity requirement in warranty cases in almost exactly the same way as *MacPherson v. Buick* (*supra*, p. 259) had restricted the privity requirement for negligence actions.

i. **Facts of *Henningsen*:** The defendant, Chrysler Corporation, produced a car with a defective steering mechanism. One of its dealers, Bloomfield Motors, sold the car to Mr. Henningsen, who gave it to his

wife. She was injured when the steering failed.

ii. **Holding:** The court held that Mrs. Henningsen could recover from Chrysler for breach of the implied warranty of merchantability (imposed by the then-effective Uniform Sales Act, a predecessor of the UCC). She could recover notwithstanding the fact that she never contracted with Chrysler directly.

iii. **Similarity to food cases:** The court saw no reason not to apply to this case the rationale of the food cases, referred to above, and not to require privity. "The unwholesome beverage may bring illness to one person; the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity."

iv. **Consumer is cultivated:** Furthermore, the court said, it is clear that under modern mass merchandising techniques, the ultimate "consumer", not the initial dealer, is the person being cultivated by advertisements. It is therefore not unfair to impose on the manufacturer responsibility to this ultimate consumer.

v. **Disclaimer ineffective:** The contract that Mr. Henningsen had signed with Bloomfield Motors contained a disclaimer of all warranties (except for a limited agreement to repair defective parts). The court held that this disclaimer was an ***"adhesion contract"***, and resulted from "the gross inequality of bargaining positions" between the manufacturer and the consumer. Therefore, the disclaimer was ruled invalid. See the further discussion of disclaimers *infra*, p. 269.

vi. **Non-purchaser status of Mrs. Henningsen:** Mrs. Henningsen failed to be in privity with Chrysler in two ways: First, as noted, Chrysler had sold the car throught its dealer. Second, the actual purchase was made by Mr. Henningsen, and given as a gift to his wife. The court held that this second lack of privity was no more a barrier to recovery than the first. Mrs. Henningsen was "a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile." Therefore, she was covered by it.

Note on vertical v. horizontal privity: Some courts have distinguished between the lack of "vertical" privity, and the lack of "horizontal privity". Mr. Henningsen failed to be in vertical privity with Chrysler, because there was an intermediate seller. Mrs. Henningsen failed to be in horizontal privity even with the dealer, because she was merely a user, and member of the same household, as the actual purchaser from the dealer. The distinction was formerly of importance, but the general abandonment of privity requirements in warranty cases (except in cases of purely economic loss — see *infra*, p. 292) renders it of only minor significance today.

c. **Reaction to *Henningsen*:** Almost all states have now accepted both aspects of the privity part of *Henningsen*. That is, they hold that a

manufacturer's (or other distributor's) warranty extends to remote purchasers further down the line, and they also hold that once the final purchaser is covered by the warranty, the warranty also applies to, at least, members of his household who may reasonably be expected to use the goods. (Whether other persons, such as bystanders, are also protected, is discussed *infra*, p. 286).

i. **Strict liability:** However, many of the decisions rejecting privity have been in ***strict liability*** suits. In general, warranty suits have been used less and less as strict liability has increased, because many of the "sales law" aspects of warranty, (e.g. the requirement that notice of the breach be given by the injured person) are really unsuited for personal injury cases.

d. UCC privity rules: The original 1962 version of the UCC, in §2-318, provided that if the final purchaser was a beneficiary of a warranty, any member of his family or household, and any house guest, was also covered, "if it is reasonable to expect that such person may use, consume or be affected by the goods", and was personally injured by the breach.

i. **Horizontal privity not mentioned:** This provision thus in effect abolished the "horizontal" privity requirement, at least for family members, house guests, etc. But it did not say anything about vertical privity; that is, it left completely unanswered (intentionally) the question of whether a manufacturer's warranties extended to a remote purchaser. For instance, if *Henningsen* had occurred under the UCC, nothing in the Code would have indicated to the court whether Mr. Henningsen was covered by Chrysler's warranty.

ii. **Left to case law:** Instead, resolution of this "vertical" privity question was left to case law. And, as noted, nearly every jurisdiction abolished the "vertical" privity requirement, at least in cases of personal injury.

iii. **Rejection of Code limitations:** Most courts simply ignored the vertical privity limitations imposed by the original version of §2-318. For instance, they held that an employee of the purchaser of a defective product, or a bystander injured by the driver/purchaser of a defective car, could recover. Some courts also rejected that section's limitation to personal injury cases, and held that a person who suffered only property damage could recover in warranty against a remote seller.

e. 1966 Amendments: In response to this fast-moving case law, two new alternative versions of §2-318 were officially promulgated in 1966. The original §2-318, discussed above, is now called "Alternative A".

i. **All foreseeable users:** "Alternative B" extends warranty protection to "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." Thus, the employee of the purchaser, or even a casual bystander injured by a defective car, may both sue the manufacturer for warranty, under this section.

ii. **Property damage:** "Alternative C" goes even further. It protects all the people that Alternative B protects, and also allows them to recover even if they suffer ***only property damage***. Furthermore, a ***corporation*** or other non-natural person may sue.

f. **Adoption by states:** Most states still have Alternative A on their books (although, as noted, courts have simply ignored its limitations in many situations). But a significant number have now adopted either Alternative B or C. New York, for instance, changed to Alternative B in 1975.

g. **Summary on privity:** In summary, virtually all states would allow one who has actually purchased goods to recover on implied warranty, even though his purchase was made from a dealer, not the defendant. Furthermore, many if not most states, either by statute or case law, would permit a non-purchaser whose use of the product is foreseeable, to recover against the manufacturer or other person in the distributive chain, at least if personal injury is involved. As to bystanders, see *infra*, p. 286.

D. **Warranty defenses:** Most defenses to products liability claims are discussed in a separate section *infra*, p. 294. Here, we consider three defenses that are virtually unique to warranty claims: disclaimers, limitation of remedies, and notice-of-breach requirements.

1. **Disclaimers:** A seller may, under the UCC, ***disclaim*** both implied and express warranties.

a. **Disclaimer of merchantability:** A seller may make a written disclaimer of the warranty of merchantability, but only if it is "***conspicuous***". UCC §2-316(2). This is usually interpreted to mean that the disclaimer must be in capital letters or bold print, not hidden in the fine print. Furthermore, the word "merchantability" must be specifically mentioned.

i. **Implied limitations:** Apart from this express disclaimer of the warranty of merchantability, the circumstances may occasionally give rise to an ***implied*** disclaimer. The most common situation is when used goods are sold "***as is***". See UCC §2-316(3).

b. **Federal warranty act:** Federal law now limits disclaimers in written warranties. The Magnuson-Moss Federal Trade Commission Improvement Act of 1974, 15 U.S.C. 2301, *et. seq.*, provides that if a written warranty is given to a consumer, there cannot be any disclaimer of any implied warranty. The manufacturer does not have to make a written warranty at all, but once he does so, the warranty must include the implied warranty of merchantability.

2. **Limitation of consequential damages:** Rather than (or in addition to) disclaiming implied warranties, a seller may often try to ***limit the remedies*** available for breach. Frequently, for instance, the seller will provide that any remedy is limited to ***repair or replacement*** of the defective product, and that there shall be no liability for consequential damages.

a. **Code restrictions:** However, the Code restricts the ways in which the seller may do this. The most important of these, at least in personal injury cases, is given by §2-719(3), which states that "limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* ***unconscionable***. . . ." In other words, if the product is designed for personal (as opposed to business) use, any provision limiting remedies to repair or replacement will not be upheld by the court, if personal injury has resulted. Thus had the UCC been in effect in New Jersey at the time of *Henningsen*, the court could have knocked out the "liability limited to repair or replacement" clause without resorting to common law principles.

i. **Commercial loss:** That same Code section, §2-719(3), also provides that where the loss from a breach of warranty is "commercial" (i.e., intangible economic loss in a business setting), a limitation of damages is ***not*** unconscionable.

3. **Notice of breach:** Under the UCC, the buyer must "within a reasonable time after he discovers or should have discovered any breach", ***notify the seller*** of the breach. UCC §2-607(3).

a. **Plaintiff not in privity:** But if the plaintiff is not in privity with the defendant, this notice-of-breach requirement is ***frequently not enforced***. This is particularly likely to be the case where the plaintiff was not a purchaser of the goods at all, but rather, a user or bystander.

E. **Phasing out of warranty suits:** A plaintiff not in privity with the defendant seller may therefore, in many situations, bring a warranty claim without being barred by the disclaimer, limitation-of-remedies, or notice-of-breach defenses. But once these defenses are eliminated from warranty actions, the warranty case (at least where based on an implied, rather than express, warranty) is virtually ***identical*** to a ***strict tort liability*** claim, discussed below. For this reason, the use of warranty claims in this situation is rapidly ***decreasing***. Prosser predicts that ". . . it would appear that 'warranty' without privity is on its way to the ashcan." (Prosser, p. 658).

1. **Useful cases:** But there are still a few non-privity situations where it may be to the plaintiff's advantage to sue on implied warranty rather than strict liability.

a. **Pure economic harm:** Some states may allow a plaintiff who has suffered ***only economic harm*** to recover in implied warranty against a remote seller, where this would not be allowed in strict liability. See *infra*, p. 292.

b. **Statute of limitations:** Warranty actions are usually held to fall within the contract statute of limitations. In UCC cases, this is four years. Strict liability cases, on the other hand, generally fall within the tort limitations period, which is usually shorter, often two or three years. Assuming that the two statutes start to run at about the same time (not always a correct assumption — see *infra*, p. 298), the plaintiff may therefore still have a warranty claim after his strict liability claim has been barred.

2. **Privity action:** And where the plaintiff has dealt ***directly*** with the defendant, he will often be much better off suing under implied warranty. For one thing, he

will have no trouble recovering a broad range of consequential damages, including lost profits and other intangible economic harm.

III. STRICT LIABILITY

A. Historical emergence: Implied warranty suits, as noted, provide for "liability without fault", in the sense that negligence by the defendant does not have to be proven. However, these actions have many contract aspects that are illogical where there is no privity between the plaintiff and the defendant. For this reason, many courts, starting with the case set forth in the following example, have abandoned the language of "implied warranty", and have allowed recovery for "***strict tort liability***".

★ **Example:** D1 manufactures, and D2 retails, the "Shopsmith", a power tool that can be used as a saw, drill, or wood lathe. P sees one on display, and has his wife buy it for him. While he is using it as a lathe, a piece of wood clamped to the machine flies out and hits him on the head, severely injuring him. P does not give timely notice of breach of warranty to D1, as is required in warranty actions by California law.

Held, by Justice Traynor, P's failure to give notice of breach does not bar his action, since D1 is strictly liable in tort. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being." The law of sales warranties is not a good way to protect consumers like P, because of requirements (like the notice-of-breach requirement) that are suitable only for commercial transactions. (The liability of D2 was not discussed). *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

B. Restatement §402A: Two years after *Greenman*, a similar doctrine of strict tort liabilty was embodied by a Tentative Draft of the Second Restatement, in §402A. This section has become far and away the most famous and influential provision of the entire Restatement. Its importance is so great that it is set out in full:

"**§402A.** Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

1. **Popular acceptance:** Section 402A has "literally swept the country." P,W&S, p. 759. It is probably safe to say that a substantial majority of American jurisdictions have adopted, if not the precise rules set forth there, at least the general theory of strict tort liability for dangerously defective products.

2. **Non-manufacturer:** Observe that §402A applies not only to the product's manufacturer, but also to its ***retailer***, and any other person in the distributive chain (e.g. a wholesaler) if he is in the business of selling "such a product". Non-manufacturer liability is discussed further *infra*, p. 287.

C. **What products meet the test:** The principal issue in many strict liability cases is whether the product is ***"defective"*** and ***"unreasonably dangerous"***.

1. **Term of art:** The Comments to Rest. 2d §402A do not define the term "defective condition" apart from the term "unreasonably dangerous". Instead, the overall phrase "defective condition unreasonably dangerous" is used as a term of art. The basic idea seems to be that a product is in a "defective condition unreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (§402A, Comment i).

   a. **"Viewpoint of the consumer" test:** In other words, if a reasonable consumer, knowing the true characteristics of the product, would nonetheless use it, the product is not "in a defective condition unreasonably dangerous".

   b. **Defendant viewpoint test:** An alternative test has been proposed by some courts and commentators. This test looks at the action of a reasonable ***defendant*** with full knowledge.

      ★ **Example:** P is employed to operate a sanding machine manufactured by D. He is injured when the machine ejects a piece of wood that is too thin to be held properly by it. P sues D in strict liability. *Held*, the test for whether the machine is "unreasonably dangerous" is whether it is " . . . one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product." In making this determination, the trier of fact should take into account the likelihood of such injury, and the cost of preventing it, just as it would in a negligence case. Also, liability might be predicated on the fact that D failed to give adequate warning to P's employer about the danger of trying to feed thin pieces. *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033 (Ore. 1974).

   c. **Imputation of knowledge:** Both of these tests have one important thing in common: they both ***impute*** knowledge to someone, and after doing so apply

what is in essence a negligence test.

2. **California rejects "unreasonably dangerous" requirement:** Although nearly all states have accepted the general principle of strict tort liability, not all have followed the Restatement's requirement that the product be "in a defective condition unreasonably dangerous". The most notable deviation from this standard has occurred in California, which has held that the plaintiff only has to prove that the product is "defective", and caused his injury; he does not have to prove that the product was also "unreasonably dangerous". In so holding, the California Supreme Court stated that "We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." *Cronin v. J.P.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972). This view is also followed by New Jersey, in *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. 1973).

   a. **Distinction not major:** But the rejection of the "unreasonably dangerous" requirement is not as significant as it might seem at first glance. The plaintiff still has to show that the product was "defective", and the very notion of "defect" includes the concept of unreasonable danger. For instance, in the case of "unavoidably unsafe" products, discussed below, the plaintiff will no more be able to prove that these products are "defective" than that they are "unreasonably dangerous"; is whiskey, which frequently causes cirrhosis, leads to heart failure, etc., "defective"? Virtually no court would say so, any more than a court would say that such a product is unreasonably dangerous.

D. **Unavoidably unsafe products:** The Restatement and the courts have agreed that a product will not give rise to strict liability if it is ***unavoidably unsafe***, and its benefits outweigh its dangers.

1. **Rabies vaccine:** The Restatement, in §402A, Comment k, cites ***rabies vaccine*** as such an "unavoidably unsafe" product. The vaccine "not uncommonly leads to very serious and damaging consequences when it is injected." Nonetheless, "since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous."

2. **State of knowledge at time of sale:** Is the existence of "unreasonable danger" and "defectiveness" to be measured by reference to the state of human knowledge at the ***time the product is sold***, or at the ***time the products liability case comes to trial?*** This question is raised by many drug cases, in which the drug is believed (not only by the manufacturer, but by the FDA) to be safe at the time it is first sold, but later turns out to have undesirable side effects. Nearly all cases have ***denied liability*** in this situation.

   Example: D manufactures a drug called MER/29, designed to reduce blood cholesterol. The drug has been approved by the FDA, and at the time it is

sold to P, is believed by everyone to have only minor side effects. However, it turns out to cause eye cataracts and other severe side effects, and after P and many others are harmed by it, it is withdrawn from the market.

Held, D is not liable. ". . . A drug, properly tested, labeled with appropriate warnings, approved by the Food and Drug Administration, and marketed properly under Federal regulation, is, as a ***matter of law***, a reasonably safe product", and does not give rise to strict liability. *Lewis v. Baker*, 413 P.2d 400 (Ore. 1966).

a. **Criticism:** Observe that the holding in *Lewis* completely eviscerates strict liability in the case of a danger which reasonable care would not have disclosed at the time of sale. It would be more in keeping with the general theory of strict liability to "impute" to the manufacturer the knowledge existing at the time of trial (i.e., that the drug causes cataracts); since a reasonable manufacturer would not release a drug knowing of this propensity (and the defendant in *Lewis* in fact did withdraw it by the time of trial), the product was defective and unreasonably dangerous, and should have subjected the defendant to strict liabillity.

b. **Cigarettes:** Prior to the Surgeon General's 1965 Report on cancer and smoking, ***cigarettes*** were probably unavoidably unsafe in the same way as MER/29, i.e., a product which no one knew posed a major danger. Since then, cigarettes have probably become a product which ***everyone*** should know poses a danger, and therefore not "unreasonably dangerous" under the "viewpoint of the consumer" test discussed above. The effect of the obviousness of a danger is discussed further *infra*, p. 275.

3. **Negligence in testing:** The manufacturer of a drug or other product may have been ***negligent*** by not failing to make ***adequate tests*** before selling the product. For instance, in other litigation involving the drug MER/29, conducted after *Lewis*, plaintiffs were able to show that the manufacturer's tests were inadequate, that the manufacturer knew this, and that it had manipulated its data in order to get the FDA to clear the drug. These plaintiffs recovered for negligence. See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 254 F. Supp. 430 (S.D.N.Y. 1966).

4. **No way to discover individual defect:** The *Lewis* case involved a drug whose general dangerous characteristics were (as found by the court) undiscoverable at the time of sale. A similar issue is presented by a product in which it is known that there is a danger that ***certain items*** will be defective, but there is no way to discover ***which particular ones*** fall in this category. Courts have almost always held that here, too, the product is ***"unavoidable unsafe"*** and strict liability will ***not apply***. The question arises most frequently in the so-called ***"bad blood"*** cases.

★ **Example:** P gets a blood transfusion while a patient at St. Joseph's hospital. The blood was supplied by Blood Services, a blood bank. The particular blood given to P turns out to have carried serum hepatitis, and P is infected. Evidence shows that, at the time the transfusion occurred, there

was no way to determine whether a particular specimen was infected with hepatitis, even though it was known that a percentage of all specimens would be. *Held*, neither the hospital nor the blood bank is strictly liable. The product was "quite incapable of being made safe for its intended and ordinary use". (The defendants did have a duty to warn of the defect, but the warning in this case, which was made by the blood bank to the doctor and to the hospital through labelling, was sufficient, even though P herself was not warned.) *Hines v. St Joseph's Hospital*, 527 P.2d 1075 (N.M. 1974).

a. **Criticism:** Almost all cases involving this "bad blood" issue have denied liability, on similar grounds. (One of the few cases finding strict liability in this situation is *Cunningham v. MacNeal Memorial Hosp.*, 266 N.E.2d 897 [Ill. 1970].) Furthermore, many state legislatures have statutorily denied liability. But it is hard to see how such cases are different from "bad food" cases, in which the manufacturer knows that there is a general danger of, say, botulism, but has no way to prevent it, and no way to tell whether a particular can has it. In such food cases, a modern court would probably impose strict liability.

E. **Warning:** A product may be held to be defective and unreasonably dangerous partially because it does not carry an ***adequate warning***. For instance, in *Hines*, the court implied that there might have been liability if the danger of hepatitis was not properly communicated (though communication to the plaintiff's doctor was held sufficient there.)

1. **Negligence aspects:** While failure to give an adequate warning is sometimes treated as giving rise to strict liability, it has strong overtones of negligence (i.e., would a reasonable man give a warning, and if so, what would he say in the warning?) The duty to warn is therefore discussed in a separate section, where both negligence and strict liability aspects are treated. See *infra*, p. 283.

F. **Common and obvious dangers:** The danger arising from a product may be so ***obvious*** or so ***commonly known*** to consumers in general, that this fact by itself will prevent the product from being deemed defective and unreasonably dangerous.

1. **Cigarettes:** Today, for instance, people are so generally aware of the fact that cigarettes frequently cause lung cancer, that a plaintiff who got such cancer would have little chance of imposing strict liability on the cigarette manufacturer. See P,W&S, p. 777.

a. **Distinguished from assumption of risk:** Such a plaintiff might also be held to have ***assumed the risk***, or to have been ***contributorily negligent***, and might be barred for this reason. (The extent to which these defenses apply in strict liability cases is discussed *infra*, p. 294.) But the two questions are not the same; for instance, the cigarettes would probably be held to be obviously unsafe, and therefore not defective or unreasonably dangerous, even if the plaintiff could show that he himself was not aware of the danger (e.g., he was deaf and illiterate).

2. **Obviousness not dispositive:** The fact that the danger is obvious will not, by

itself, always be dispositive. For instance, if the defendant makes a power mower without adequately shielding the blade, he will probably not win a strict liability suit by saying that the danger was obvious to anyone who used the mower; even if this is so, the difficulty and cost of removing the danger are so slight that the obviousness of the danger will probably be irrelevant. (But see the further discussion of obviousness in the context of design defects, *infra*, p. 280).

G. Proving the case: The plaintiff in a strict liability case must prove a number of different *prima facie* elements. The things he must prove are not very different from those he would have to prove in a negligence case, particularly a negligence case relying on *res ipsa loquitur*. It is true that the plaintiff does not have to prove that the manufacturer (or retailer) failed to exercise due care, but he must still establish the following elements:

1. **Manufacture or sale by defendant:** He must show that the item was in fact manufactured, or otherwise placed in the stream of commerce, by the defendant. (Strict liability applies to anyone in the business of selling goods of the type in question, whether or not he is the manufacturer — see *infra*, p. 287.)

2. **Existence of defect:** He must show that the product was ***defective***; the difficulties of showing this are discussed above, and also in the treatment of design defects *infra*, p. 278.

   a. **Subsequent remedial measures:** To prove that the product was defective, particularly in cases of alleged design defect, the plaintiff will often try to show that the defendant subsequently ***redesigned*** the product to make it safer. Most courts apply a general rule that such evidence is ***inadmissible*** to prove the defectiveness, on the grounds that to allow it would discourage manufacturers from doing such redesigning. This rule developed in negligence cases, prior to the adoption of strict liability.

      i. **Refusal to apply to strict liability:** The California Supreme Court, in a strict liability case, refused to apply a statute barring such redesign evidence, holding that the statute was intended to apply only to negligence cases. *Ault v. International Harvester Co.*, 528 P.2d 1148 (Cal. 1975).

      ii. **Admissible to show cost:** Other courts have held that despite the general rule against such evidence, the fact that the defendant made a redesign can be admitted for the limited purpose of rebutting the defendant's argument that the product is not "defective" because to remove the danger would be unduly costly, and the product is really therefore "unavoidably unsafe". Thus in *Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971), a case alleging that a drug manufacturer failed to give an adequate warning of the dangers of its drug, the plaintiff was permitted to introduce the fact that subsequent packaging contained a more detailed warning, for the limited purpose of showing that the increased warning "was not costly or burdensome to [the defendant] in relation to the risk or danger involved."

3. **Proximate cause:** The plaintiff also has to show that the product, and its defective aspects, were the ***cause in fact***, and the ***proximate cause***, of his injuries.

   a. **Rebutting alternative causes:** This means that he may have to rebut the defendant's suggestion that alternative events were the sole cause in fact of the accident, or that they were ***superseding causes*** that prevented the defect from being a proximate cause. The issue arises most frequently in the case of the defendant's allegation that the plaintiff, or some third person, was ***negligent***. However, most courts are quite liberal about letting the plaintiff at least get to the jury on this issue.

   ★ **Example:** P accidently tries to start his Oldsmobile by turning the ignition while the automatic transmission selection lever shows "drive"; the car starts, leaps forward, and injures P and his family. P sues the manufacturer of the automobile, GM. At trial, he produces an expert who testifies that, after the accident, he tested the car and found that it would start in the "drive" position, and that the front wheels accelerated almost immediately. *Held*, the jury could properly find that the car did indeed start in the "drive" position, and that this was a defect which existed at the time of manufacture. The trial judge's direction of the verdict for the defendant was therefore erroneous. *Friedman v. General Motors Corp.*, 331 N.E.2d 702 (Ohio 1975).

   A dissent argued that P had produced no evidence that, even if the defect existed and caused the accident, it had existed when the car left GM. Also, P did nothing to negate other possible causes of the accident, and this case is not one of those situations suitable for application of a doctrine like *res ipsa loquitur* (i.e., a case in which the accident would probably not have happened without a defect on the manufacturer's part.)

   b. **Intervening acts:** In determining whether an ***intervening act*** is superseding or not, the courts seem to be applying pretty much the same rules in strict liability cases as in negligence ones. Thus if the occurrence of the intervening act is reasonably foreseeable, or it is unforeseeable but causes the same type of harm as made the product dangerous, the intervention will probably not be superseding. See Prod. L. Nut., pp. 202-3.

      i. **Slightly stricter test:** However, because strict liability does not depend on any fault by the defendant, the courts may be slightly quicker to find a superseding cause than in negligence cases, particularly where that cause is the ***negligence or recklessness of the plaintiff or a third person.***

      ii. **Misuse of product:** Negligence by the plaintiff or a third person may also provide the defendant with an argument that the product was "misused", and therefore not defective at all. This defense is discussed *infra*, p. 296.

4. **Defect existed when in hands of defendant:** Finally, the plaintiff must show that the defect existed at the time the product left the defendant's hands. In the

case of a suit against a manufacturer, where the product has gone through several middlemen, and has then been used for a time by the plaintiff before the accident, this can be a very hard thing to do.

a. **Lenient courts:** But here, as in the case of showing that a defect was the proximate cause of the accident, the courts are frequently lenient to the plaintiff. For instance, in *Friedman*, *supra*, testimony by the dealer who had sold plaintiff the car to the effect that no one had adjusted the transmission after the car left the factory, and plaintiff's own testimony that he had never tried to start the car in "drive" (thus affording no opportunity to discover the defect) were enough to allow the jury to conclude that the defect existed when the car left the factory.

b. **Res ipsa inference:** In many strict liability cases, an inference similar to that of ***res ipsa loquitur*** is permitted. That is, from the fact that the product did not behave in the usual way, and general evidence that no one else tampered with it, the jury may be allowed to conclude that it was defective, and that the defect existed when the goods left the defendant's hands. See P,W&S, p. 791.

IV. DESIGN DEFECTS

A. **Design defects distinguished from manufacturing ones:** There are two fundamental kinds of product defects. One might be termed a "manufacturing defect"; this is the case where the particular item that injures the plaintiff is different from the other ones manufactured by the defendant, because something went wrong with the manufacturing process. For instance, the defective spokes in *MacPherson v. Buick*, *supra*, p. 259, and the defective steering gear in *Henningsen*, *supra*, p. 266, are manufacturing defects.

1. **Design defect defined:** The other major kind of defect is usually called a ***"design defect":*** all of the similar products manufactured by the defendant are the same, and they all bear a feature whose design is itself defective, and unreasonably dangerous.

B. **Aspects of negligence:** Most design defect claims have heavy negligence aspects, even though they may be couched in strict liability terms. Normally, the manufacturer either is actually, or should be, aware of the safety attributes of his design. The manufacturer of a power mower, for instance, which does not have a guard shielding the user's foot from the blade, ought to be aware of the potential for harm. A suit against that manufacturer, therefore, whether phrased in negligence or strict tort, would involve substantially identical issues, i.e., whether the defendant chose a design that posed an unreasonable danger to the plaintiff, in view of the burdens of using some other design (e.g., a full guard).*

*The California Supreme Court has recently imposed a combined negligence and strict liability test for design defects. There will be a design defect, the court held, if either (1) the design's dangers outweigh its utility (the negligence standard) or (2) the design does not perform as safely as a reasonable consumer would expect it to, when used for an intended or reasonably forseeable purpose (a strict liability standard; see *supra*, p. 272). *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443 (Cal. 1978).

1. **Strict liability claims:** Nonetheless, there are at least a few common situations in which the imposition of strict liability on a design defect claim will produce a materially different result than a negligence claim.

   a. **Retailer:** Most obviously, if the suit is against a retailer or other re-seller of the product who did not manufacture it, the plaintiff has no chance with a negligent design claim, since the defendant did not do the designing. The plaintiff's only choice is to argue strict liability, although his case as to whether the design was defective and unreasonably dangerous will resemble the case he would put on if he were suing the manufacturer for negligence.

   b. **Unforeseeable defect:** The other situation is one in which the defendant neither knew nor had reason to know of the dangerous attributes of his design. For instance, if it turned out that a particular metal used by the defendant, and reasonably thought to be strong, in fact developed severe structural weaknesses after a certain period of time, the designer's choice to use that metal might make him strictly liable but not negligent.

C. **Types of design defect claims:** Most cases claiming design defects fall within three general categories, which sometimes overlap: (1) structural defects; (2) absence of safety features; and (3) suitability for unusual purposes. As noted, in most of the cases (at least those involving manufacturers) it makes no difference whether the case is phrased in terms of negligence or strict liability.

D. **Structural defects:** The plaintiff may be able to show that because of the defendant's choice of materials, his product has a ***structural weakness***, which caused it to break or otherwise become dangerous. A chair built out of lightweight materials, for instance, which is likely to collapse whenever a person of more than average weight sits on it, might be held to be structurally defective.

   1. **Test:** The test is usually whether the product is less durable than a reasonable consumer would expect, taking into account, among other things, the price of the product. A $4.00 chair would not have to have the same durability as a $100.00 one, in order to avoid structural defectiveness.

      a. **Length of product's life:** A related question is ***how long the product should last*** before breaking. It is often said that the seller does not undertake to provide a product which will never wear out. But if it wears out too quickly, in relation to its cost, it may be held defectively undurable.

   2. **Most durable design not required:** It must be kept in mind that the defendant's obligation is not to provide the ***most*** durable design, but simply one which is not unreasonably flimsy. For instance, in *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974), the plaintiff claimed that she had been injured in a car manufactured by the defendant when a gasket outside the carburetor worked its way loose and fell into the carburetor, jamming the accelerator and making the car unbrakeable. The court reversed a finding of liability, stating ". . . few machines within our ability to purchase could not be designed 'better' in some respect. This determination will not suffice as a predicate for a finding of improper or defective design. . . ."

a. **Evidence of lack of similar breakages:** The defendant is usually allowed to show that the breakage has not occurred in other uses of the same product. Thus in *Henderson*, the defendant was permitted to show that over 1,500,000 cars used the gasket design at issue, and that it had received no notices of the gasket slipping apart from this case.

E. Lack of safety features: It may be the case that a ***safety feature*** could be installed on a product with so little expense, compared with the cost of the product and the magnitude of the danger existing without the feature, that it is defective design not to install it.

1. **Defenses:** The defendant to such a claim often attempts to show that competitive products similarly lack the safety feature, that the feature would be unduly expensive to install, or that it would prevent the product from being put to its intended use. At least the latter two defenses are often successful. For instance in *Olson v. Arctic Enterprises Inc.*, 349 F. Supp. 761 (D.N.D. 1972), a shield over a portion of a snowmobile would have prevented the loss of the plaintiff's foot, but the court denied liability on the grounds that "engineers have not succeeded in designing a shield that would leave the machine operable."

   a. **State of the art:** But more and more courts are refusing to allow the defendant's showing that his design was ***"state of the art"*** (i.e., what the competition is doing) to be a complete defense. Such courts often point to Judge Hand's statement in *The T.J. Hooper*, *supra*, p. 85, that custom is not dispositive on the issue of negligence because an entire industry may have lagged in the installation of safety devices. This principle seems equally applicable to strict liability claims.

2. **Obvious defects:** The defendant may also contend that he had no obligation to install a safety device because the danger was ***"obvious"***. It is true that the obviousness of the danger may be a factor bearing on the degree of danger, and hence the need for protection (since a concealed danger is, all other things being equal, more likely to cause harm than an obvious one against which the plaintiff can protect himself.)

   a. **Not dispositive:** But most courts have recently rejected any *per se* rule automatically removing the need for protective devices to guard against an obvious defect. See, e.g., *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 348 N.E.2d 571 (N.Y. 1976), holding that a printing press manufacturer could not avoid liability for lack of protective guardrails merely on the grounds that the danger of getting too close to the machine was obvious to the plaintiff and other pressmen.

3. **Negligence standard:** In the area of safety precautions, the court is particularly likely to impose a pure negligence standard, i.e., a balancing of the cost of installing the feature against the probability of harm multiplied by the magnitude of the harm. (See the Learned Hand test, *supra*, p. 77.)

4. **Subsequently discovered precaution:** What if no economically sensible safety feature exists at the time the product is manufactured, but one has been found by

the time of trial? It seems probable that, by analogy to the findings of no liability in the "subsequently discovered dangers" drug cases, such as *Lewis v. Baker*, *supra*, p. 273, there will be no liability in this situation. This result would, however, significantly water-down the strict liability aspects of design defect claims.

F. Suitability for unintended uses: Suppose a product's design poses no unreasonable dangers when the product is used for the use intended by the manufacturer, but does pose such danger when the product is put to ***some other use.*** Does the manufacturer have any duty at all to guard against the dangers from such uses?

1. **Unforeseeable misuse:** If the misuse of the product is ***unforeseeable***, courts agree that the manufacturer has no duty to design the product so as to protect against it.

2. **Foreseeable misuse:** Where the "misuse", or other use not intended by the manufacturer, is ***reasonably foreseeable*** by him, most modern courts require him to take at least reasonable design precautions to guard against danger from that use. Alternatively, a ***warning*** to the purchaser may sometimes suffice; see *infra*, p. 283.

3. **Second collision cases:** The most common "unintended but foreseeable use" cases involve automobile manufacturers' duty to provide a ***"crashworthy"*** vehicle. The plaintiff's theory in such cases is that, although the manufacturer is of course not liable for a car accident itself, it should be liable for not taking reasonable precautions to minimize the injuries to passengers once the accident occurs. As the idea is sometimes put, the manufacturer should take design precautions against the so-called ***"second collision"***, i.e. the collision between the passenger and the inside of his own automobile following the initial accident.

   a. **Recent view:** The first courts to consider this issue held that the car manufacturer had no such obligation, since collisions were not an "intended" use, and also because there was simply no duty to make a crash-proof car. See, e.g., *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966). But most courts that have recently considered the issue have held that the manufacturer ***does*** have an obligation to take reasonable precautions to make the car reasonably safe in an accident.

   ★ **Example:** P's Chevy Impala overturns following a near-collision, and the roof buckles, injuring P. In his suit against GM, P produces testimony by an expert witness, a former GM design engineer who had helped design Impalas, including the 1969 model (the one bought by P). The witness testifies that he had recommended the installation of a "roll-bar" to maintain the structural integrity of the passenger compartment in a roll-over accident, but that his superior had rejected this on account of the cost and the unsaleability of the feature.

   Held, this evidence was sufficient so that the trial court should not have dismissed the complaint as a matter of law. It is irrelevant that GM's design did not cause the initial accident, since the company can still be

liable for aggravation of P's injuries in the "second collision". Furthermore, although accidents are not the "intended" use of the vehicle, they are a very foreseeable byproduct of that intended use; statistics show that between a quarter and two-thirds of all cars will be at some point be involved in a collision producing injury or death. GM did not have an obligation to design a crash-proof car, but simply an obligation to make the car ***reasonably safe*** in a collision. The expert's testimony was enough to establish the unreasonable lack of safety in a crash, even though there was evidence that no mass-produced American car had ever been manufactured with the roll-bar he recommended. *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Civ. App. 1974).

A dissent argued that even though a manufacturer may have an obligation to produce a car that is reasonably safe in a collision, the expert's testimony here was not enough to show that this duty had been neglected. The expert admitted that the Impala was no less crashworthy than other passenger sedans of the same size, and he failed to recite the specific considerations, such as "cost, economy of operation, effect on maneuverability, and appearance" that led him to believe that the car was not crashworthy.

i. **Industry custom:** As *Turner* indicates, industry custom (e.g., the fact that all other manufacturers have the same lack of special safety features) is admissible on the question of reasonableness. But, as noted, the custom itself may be held to be negligent, as it was in *Turner*.

b. **Obvious design feature:** In determining whether a vehicle is unreasonably unsafe in an accident, it may only be compared with other vehicles of ***similar general type***. Thus a Volkswagen van, with the engine in the rear and very little metal in front of the driver to absorb the force of a collision, is not defective merely because it is less safe than a typical passenger car which does have a whole engine compartment to absorb the impact of a collision. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

i. **Obvious danger:** Another way of reaching the same result is to say that a design is defective only if it is "hidden", rather than "obvious". Thus almost anyone who thought about the matter would realize that a Volkswagen van will subject its driver and front seat passenger to greater injuries from a head-on collision than would a Cadillac.

4. **Design permitting reckless use:** A few plaintiffs have made the adventurous claim that the defendant should be liable for defective design because that design ***permitted the user*** (a person other than the plaintiff) to use the product recklessly. For instance, a plaintiff hit by a drunk driver driving at more than 100 m.p.h. sued GM on the theory that it was liable for designing a car that could be driven so fast. The plaintiff lost: "Simply because a certain amount of such illegal operation may be anticipated by the manufacturer does not impose a duty on him to make it impossible, any more than a manufacturer of guns or knives would have a duty to make impossible the wrongful use of its potentially lethal

products." *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967).

5. **Contributory negligence defense:** The defendant in a "product misuse" claim will, in addition to arguing that he had no duty to guard against misuse, also frequently argue that the plaintiff was contributorily negligent. This defense is discussed *infra*, p. 294.

V. DUTY TO WARN

A. How the duty to warn may arise: The presence or absence of a ***warning*** as to the possible dangers of a product may have a great bearing on whether the product is "defective" or "unreasonably dangerous", as may the quality of the ***directions for use*** given by the manufacturer.

1. **Negligence and strict liability:** The failure to give adequate warning or instructions may buttress a case based on any of the three theories of recovery. For instance, Rest. 2d, §402A, Comment j, notes that "to prevent the product from being unreasonably dangerous [and giving rise to strict liability], the seller may be required to give directions or warning, on the container, as to its use."

   a. **Negligence aspects predominate:** However, in determining what warnings or instructions are needed, a predominantly negligence standard is usually used, as in the case of what kind of a design is adequate (see *supra*).

   b. **Standard:** Thus the probability of accidents that could be avoided by correct warning or instruction, multiplied by the severity of these accidents, is weighed against the difficulty of furnishing such warning or direction. See Prod. L. Nut., pp. 162-3.

2. **Drug cases:** The manufacturer is often held to have a duty to warn in cases involving ***prescription drugs***. In such cases, the adequacy of the warning is sometimes determined not only by looking at the actual written warnings and instructions which come with the drug, but also the surrounding advertising and publicity campaign for the drug.

   Example: P has tonsillitis, and her doctor prescribes Chloromycetin, manufactured by D. Each container of the drug contains a warning that blood disorders may be a side-effect, and that the drug should not be used for minor infections. P develops a serious form of anemia, and eventually dies. In a wrongful death action, there is evidence that D's "detail men" (who visited doctors and briefed them on the drug) consistently downplayed the danger of blood disorders. *Held*, the jury could properly conclude that the printed warnings were "in effect cancelled out and rendered meaningless in light of the sales effort made by the detail men", and could therefore properly find D liable for failing to give an adequate warning. *Incollingo v. Ewing*, 282 A.2d 206 (Pa. 1971).

3. **Unknown dangers:** If the defendant can show that it neither knew nor, in the exercise of reasonable care, should have known, of a danger at the time of sale, it will generally be held that there was ***no duty to warn*** of the unknown danger.

See P,W&S, p. 770. This means that not only may the plaintiff not recover for negligence, but also that the product is likely to be held "unavoidably unsafe", defeating the strict liability claim. Thus in *Lewis v. Baker*, *supra*, p. 273, the MER/29 case, the Appeals Court held in effect that the manufacturer's failure to warn of the danger of eye cataracts and other by-products unknown to it at the time of sale did not give rise to strict liability.

B. Danger to small number of people: If the manufacturer knows that the product will be dangerous to a ***small number*** of people, may it make the decision that the need for a warning is not sufficiently great? This will usually turn on the ***magnitude*** of the danger; if the danger is great enough, even a small number of potential bad results will require a warning.

Example: D manufactures the Sabin oral polio vaccine, and fails to warn users of the small risk of getting polio directly from the vaccine. P, an adult, takes the vaccine, and develops polio. Evidence at trial indicates that D was aware of the risk that a small number of persons in P's general age and geographical class (approximately one in one million) will get the disease as a direct result of the vaccine.

Held, D is liable for the failure to warn. "When, in a particular case, the risk qualitatively (e.g., of death or major disability), as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true choice judgment, medical or personal, the warning must be given." Here, the chance that P would have gotten polio without the vaccine was not so great that the court could say that P really had no choice except to take the vaccine; therefore, a warning was required. D can be liable in strict tort or breach of warranty, as well as negligence. *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968).

C. Obvious danger: If the danger is ***obvious*** to most people, this will be a factor reducing the defendant's obligation to warn. But many recent decisions are reluctant to hold that the mere obviousness of the danger automatically means that there is no duty to warn, at least where there is evidence that some substantial minority of people, including the plaintiff, were not aware of the danger.

D. Warning does not necessarily make product undefective: If the manufacturer does give a warning, this will not always be enough to make the product undefective, and bar strict liability. Some products may be so dangerous that they should not be marketed at all, with or without a warning. Thus, "An electrical appliance with uninsulated wires would not be made duly safe by attaching a warning to look out for the danger of electric shock." Wade, "On the Nature of Strict Tort Liability for Products", 34 Miss. L.J. 825, 842.

E. Warning against misuse: Just as modern cases may require the defendant to design to protect against ***foreseeable misuses*** of the product, so he may have to ***warn*** against such misuses. This duty was carried to almost ridiculous extremes in the case set forth in the following example.

Example: P and her friend X are arguing about whether the candle they

are using is scented. To resolve the dispute, X decides to pour a bottle of P's Faberge cologne over the candle; the candle catches fire, badly burning P. A jury finds for P against Faberge. *Held*, the trial judge correctly allowed the case to go to the jury. Faberge had no duty to warn against pouring cologne on candles. But it did have a duty to issue a general warning against putting the cologne near fire, since this might have occurred in less unpredictable ways, such as by a woman's striking a match to light a cigarette near the top of an open cologne bottle. *Moran v. Faberge, Inc.*, 332 A.2d 11 (Md. 1975).

Note: The *Moran* case might be analogized to those proximate cause cases (*supra*, p. 137), holding that where harm occurs through an intervening cause that is unforeseeable, but the harm is itself the kind the risk of which made the defendant's conduct negligent, the intervening act is not superseding.

F. Allergies: A manufacturer may have a duty to warn of possible ***allergic reactions***. Rest. 2d, §402A, Comment j, states that "where . . . the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it", at least if he knows or should know about it.

1. **Balancing test:** Recent cases have adopted the same "balancing test" approach to allergy warning issues as they have in other kinds of warning cases. Thus if the plaintiff's allergic reaction, and the foreseeable reactions of others, are of only mild severity, a greater percentage of the overall population will have to be susceptible before liability is found.

2. **Hypo-allergenic claim:** If the defendant markets its product as ***"hypo-allergenic"***, this may be held to be an ***express warranty*** that the product will not cause an allergic reaction. This would be true even if the seller neither knew or should have known of the possibility of allergy. See Prod. L. Nut., p. 191. See also the disucssion of express warranties, *supra*, p. 263.

VI. WHO MAY BE A PLAINTIFF

A. Summary of general rules: Virtually any reasonably foreseeable ***user*** or ***purchaser*** of a defective product will have standing to sue its manufacturer or seller, under either negligence or strict liability theories.

1. **Negligence:** To recover in negligence, the user simply has to be "reasonably foreseeable", which he will almost always be. The test is really that enunciated in *Palsgraf*, *supra*, p. 124.

2. **Strict liability:** The strict liability section of the Restatement, §402A, allows recovery by any "ultimate user or consumer." See *supra*, p. 271..

3. **Warranty:** Almost any ***purchaser*** can recover on implied warranty of merchantability, on the basis of case-law extending the UCC's warranties to

remote sellers (e.g. a manufacturer who has put the product through one or more dealers, before it was sold to the plaintiff.)

a. **Non-purchaser users:** But if the plaintiff was not a purchaser, but merely a user, he will be able to recover only if he fits within the Alternative to §2-318 adopted by his state (see *supra*, p. 268) or is allowed to recover under local case-law (which in many states permits warranty recovery by such non-purchasers.) See *supra*, p. 268.

b. **Express warranty:** The plaintiff may sue on an express warranty as long as he can show that he was a member of the general class that the manufacturer reasonably expected or should have expected to be reached by the warranty, even if the plaintiff was merely a user, not a purchaser. See *supra*, p. 264.

B. Bystanders: The most substantial question in the area of what classes of persons may sue concerns ***bystanders***, i.e., persons who are neither purchasers nor users of the product, but who are injured merely because they happen to be nearby.

1. **Negligence:** If the claim is based on negligence, the plaintiff apparently has to show that he was a "reasonably foreseeable" plaintiff, under the *Palsgraf* test.

2. **Strict liability:** The Restatement, in a Caveat to §402A, expressed no opinion about whether there should be ***strict liability*** for harm to "persons other than users or consumers", i.e. bystanders. However, Comment l to that same section does enlarge the class of "consumers or users" to include those who ***prepare the product*** for consumption (e.g. "the housewife who contracts tularemia while cooking rabbits for her husband", and "the husband who is opening a bottle of beer for his wife to drink.") Also, a person using the product "for the purpose of doing work upon it" is a user (e.g. "an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.")

a. **Extension by case-law:** However, since this Caveat was published in 1965, courts have been very willing to give strict liability protection to ***any bystander*** whose presence was reasonably foreseeable.

Example: P1 is driving her nearly new Rambler, when she loses control of it, due to a defective draft shaft. She collides with P2, and they both bring a strict liability suit against the car's manufacturer, American Motors, and the dealer, Mission Rambler. *Held*, strict tort liability may be applied in favor of P2, even though he was merely a bystander: injury to bystanders "is often a perfectly foreseeable risk of the maker's enterprise. . . . If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities." *Elmore v. American Motors Corp.*, 451 P.2d 84 (Cal. 1969).

b. **Who is foreseeable:** It is pretty well settled now that injuries to

pedestrians, passengers, and occupants of other cars, are reasonably foreseeable results of a defective automobile. But most courts have, in the case of other kinds of bystanders, applied the foreseeability standard fairly strictly.

★ **Example:** P, a four-year-old girl, is injured when she puts her hand on a moving conveyor belt on a forage wagon being operated on her grandfather's farm, which was manufactured by D. She sues in strict liability. *Held*, ". . . The liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. . . . It cannot . . . be fairly said that a manufacturer should reasonably foresee that a four-year-old child will be permitted to approach an operating farm forage wagon or that the child will be permitted to place her fingers in or on the holes in its moving screen." Therefore, the trial court's dismissal of the complaint was proper. *Winnett v. Winnett*, 310 N.E.2d 1 (Ill. 1974).

VII. WHO MAY BE A DEFENDANT

A. Cases involving chattels: In the true "product" liability case (i.e., a case involving a "good" or "chattel"), both strict and warranty liability will apply to ***any seller*** in the business of selling goods of that kind. See Rest. 2d, §402A(1)(a); UCC §2-314(1).

1. **Retail dealers:** This means that a ***retail dealer*** who sells the good, but has not manufactured it, will have strict liability as well as warranty liability, even though there is nothing he could have done to discover the defect. It is in the area of retailer liability that strict liability produces a markedly different result from negligence.

   a. **Must be in business of selling goods:** Both strict and warranty liability are triggered only if the seller is "in the business" of selling goods. Thus a private individual who sells his car has neither liability, since he does not make a business of such sales. Similarly, even a businessman who makes a sale outside of the usual course of his business (e.g. he sells all his furniture because he is relocating his office) will not have liability.

      i. **Sales need not be major part:** But as long as the sale is part of the business, it will give rise to liability even if it is not the predominant or even an important part; thus strict liability applies to "the owner of a motion picture theater who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home." Rest. 2d, §402A, Comment f.

2. **Used goods:** There is much controversy about whether there can be strict or warranty liability upon the seller of ***used goods***, particularly used cars. A number of courts, probably a majority of those that have considered the question, have held that there is ***no such liability.***

★ **Example:** P1 and P2, young children, are walking home from school when they are hit by a used car. A suit claiming that the car's brakes were defective is brought against the driver and the used car dealer. *Held*, strict liability will not be imposed upon the used car dealer, absent a showing that the defects were created by him. Otherwise, "the used car dealer would in effect become an insurer against defects which had come into existence after the chain of distribution was completed, and while the product was under the control of one or more consumers." *Peterson v. Lou Bachrodt Chevrolet Co.*, 329 N.E.2d 785 (Ill. 1975).

A dissent pointed out that the used car dealer had placed the item in the stream of commerce, and reaped the profits from doing so. It is true, the dissent stated, that the cost of repairing some defects would be more than the car was worth, and liability should not be imposed in such cases. But where the defect could be fixed at a reasonable cost, strict liability should be applied even though the car is used.

a. "Unreasonably dangerous": Even in those courts placing no absolute bar against strict liability for used products, the defendant will often be allowed to show that in view of the age of the product, and its low price, it was not "unreasonably" defective. For instance, a jury was allowed to find that a $500, seven-year-old vehicle that had 50,000 miles on it was not "unreasonably dangerous", despite the fact that its brakes failed the same day it was bought. *Cornelius v. Bay Motors, Inc.*, 484 P.2d 299 (Ore. 1971).

3. Component manufacturers: The manufacturer of a part which is defective, and which is then ***incorporated*** as a ***component*** in a larger product, will be strictly liable if the defect causes injury.

a. Restatement Caveat: Rest. 2d, §402A has a Caveat expressing no opinion regarding strict liability of such component manufacturers, but recent cases have generally upheld liability, as long as the plaintiff can show that the defect existed when the component left the maker's hands.

b. Warranty: The same result should follow where the suit is brought for breach of implied warranty. See Prod. L. Nut., p. 80.

i. *Goldberg v. Kollsman Instrument:* One of the earliest and best known cases involving the liability of a component manufacturer was *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81 (N.Y. 1963). The plaintiff in *Goldberg* sought to recover in warranty against the manufacturer of a defective airplane altimeter, which may have caused the crash of an airplane and the death of the plaintiff. The court declined to impose liability on the component manufacturer, on the grounds that "adequate protection is provided for the passengers by casting in [strict] liability the airplane manufacturer which put into the market the completed aircraft." However, it is doubtful that the *Goldberg* court meant to foreclose the possibility of component manufacturer liability in an appropriate case, and other courts have been willing to do so.

c. **Knowledge of unsuitability:** Whether the suit is based on warranty or strict liability, the plaintiff must show that the component was defective at the time it left the component manufacturer. If the assembler puts the component to a use to which it was not intended, this will probably be enough to prevent the component maker from being liable, at least if he had no reason to know this would occur. Rest. 2d, §402A, Comment b, provides that "the manufacturer of pig iron, which is capable of a wide variety of uses, is not likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer."

i. **Foreseeable unsuitable use:** On the other hand, if the component maker has reason to know that the assembler will use the product for unsuitable purposes, he may be held strictly liable for not preventing this misuse. Thus a maker of plate glass was held strictly liable for not warning his distributor, the installer of the glass, and the ultimate user, that the glass should not be used in "doors and high traffic areas [where] safety required heavier glass." *Brizendine v. Visador Co.*, 437 F.2d 822 (9th Cir. 1970).

B. **Lessors of goods:** The UCC implied warranties, and Rest. 2d, §402A, both apply only to "sellers" of goods. But by analogy to these provisions, courts frequently impose strict liability upon a ***lessor*** of defective goods. Thus a number of ***car rental*** companies have been held strictly liable when defective cars they rented have injured the lessee, a passenger in the car, or a pedestrian. See P,W&S, p. 814. However, the lessor must be in the "business" of leasing.

1. **Negligence liability:** The lessor may, of course, also be liable for negligence in failing to discover the defect. See *supra*, p. 260.

2. **Warranty:** A court might also allow recovery on an implied warranty theory by analogy to the UCC.

C. **Sellers of real estate:** Sellers of ***real estate*** have also, again by analogy, sometimes been subjected to strict and warranty liability when the property turns out to have been defective. The best-known case is *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965), in which the defendant, a mass-producer of homes, was held strictly liable for breach of an implied warranty of "habitability" when the infant plaintiff was injured by the house's defective hot-water system.

1. **Privity requirement:** In *Schipper*, the plaintiff was not the purchaser of the house, but the purchaser's child. Many courts, however, although willing to recognize an "implied warranty of habitability", or strict liability, have applied it only where the plaintiff is the actual contracting party.

a. **Remote purchaser:** This has been particularly true where the injured person was not even a family member of the original purchaser, but instead, a ***subsequent purchaser***, or a member of that person's family. See, e.g.,
★ *Wright v. Creative Corp.*, 498 P.2d 1179 (Col. Ct. App. 1972), holding that the implied warranty of habitability applies only to the person who purchases

directly from the builder-vendor, and also denying strict liability completely. (The court did, however, allow negligence liability from the builder-vendor to a remote purchaser.)

2. **Seller who did not build house:** Another limitation frequently imposed is that the defendant must be the ***actual builder***, not merely a prior occupant. Such a result can be justified on the grounds that the defendant-homeowner is not in the "business" of selling homes, and should not bear "enterprise liability" for defects as a mass-producer should.

   a. **Concealment of known dangers:** But even such an "amateur" seller may be liable if there were defects of which he was aware, and which he actively concealed. See *supra*, p. 189.

D. Lessors of real property: ***Lessors of real estate*** have also, in a few cases, been held to impliedly warrant the habitability of the premises. But in many states, the lessor does not even have full negligence liability, let alone strict or warranty liability. See the discussion of negligence *supra*, p. 185.

E. Services: One who sells ***services***, rather than goods, does not fall within Rest. 2d, §402A, nor within the UCC implied warranties (except that sales of food and drink in a restaurant are within the Code). Here, as with real estate, the courts have sometimes been willing to apply strict and warranty liability by analogy, at least where the use of a defective product is ***incorporated*** into the services.

   ★ **Example:** P goes to D's beauty parlor to get a permanent. D uses a solution made by a cosmetics company, which causes acute dermatitis on P's scalp. *Held*, P may recover against D for either breach of implied warranty or strict liability. The traditional distinction between a "sale" and a "service" should not be dispositive. If anything, by the fact that D's employees actively selected the cosmetic, and personally applied it, D's liability should be greater than if it merely sold it over the counter. *Newmark v. Gimbel's, Inc.*, 258 A.2d 697 (N.J. 1969).

1. **Services by professionals:** But where the services are rendered by a ***"professional"***, he will almost never be liable in either strict tort or warranty, even if he uses a product which is defective. Thus in *Magrine v. Krasnick*, 227 A.2d 539 (N.J. 1967), aff'd 241 A.2d 637 (1968), the defendant dentist inserted a needle into the plaintiff's jaw, where it broke because it had been defectively manufactured. The plaintiff could not sue for malpractice (i.e., negligence), because there was no evidence that the defendant knew or should have known of the defect. The court denied warranty liability, on the grounds that the dentist had not "put the needle in the stream of commerce"; furthermore, if the dentist had to buy insurance to cover strict or warranty liability, this would drive up the costs of medicine and medical insurance even beyond their present high levels.

   a. **Insurance company's refusal to settle:** Two cases have indicated, in dicta, that an ***insurance company*** will be strictly liable if it ***refuses to settle a case***, and a judgment is then rendered against the policy-holder in excess of the amount of the policy. See, e.g., *Rova Farms Resort, Inc. v.*

Investors Ins. Co. of America, 323 A.2d 495 (N.J. 1974); see also P,W&S, p. 826. Since an adjuster or insurance company lawyer making a decision whether to settle is making a professional judgment, it is hard to see why the rule against strict liability imposed in *Magrine* should not apply.

F. Endorsers: A few bold plaintiffs have tried to establish strict or warranty liability against ***magazines*** and other defendants who carry ***advertising*** for a defective product, or who implicitly endorse it in some other way.

1. **Negligent misrepresentation:** If the plaintiff can show that the defendant made an actual representation as to the quality of the goods, and that this representation was incorrect (even if only negligently incorrect), he may be able to recover. For instance, where Good Housekeeping Magazine carried an ad for shoes, and stated that it had granted its "Good Housekeeping Seal of Approval" to them (which meant that the publisher was satisfied, *inter alia*, that the product was a "good one"), it was held that the plaintiff could recover if she could show that the magazine had not carefully tested sample shoes. *Hanberry v. Hearst Corp.*, 81 Cal. Reptr. 519 (Cal. Ct. App. 1969).

2. **No endorsement:** But the mere fact that a product was advertised in the defendant's publication is not by itself (e.g., without a "Seal of Approval") enough to confer even liability for negligence, let alone strict liability. Thus a magazine that carried an ad for fireworks was held to have no liability when the ★ fireworks proved dangerously defective; *Yuhas v. Mudge*, 322 A.2d 824 (N.J. 1974). Otherwise, publishers would be subjected to "a staggering adverse effect".

VIII. INTERESTS THAT MAY BE PROTECTED

A. Property damage: Products liability is generally involved with ***personal injury***, and the rules discussed previously in this chapter were generally formulated in such cases. But the plaintiff's damages in some cases may consist of ***property damage.*** If so, may he recover on the same basis as if there were personal injuries?

1. **Recovery allowed:** The answer is generally "yes", assuming that the court finds that the damage in question really was ***"property damage"***, as opposed to what might be called ***"intangible economic harm"*** (e.g., ***lost profits***), discussed below.

   a. **Restatement view:** Thus the Restatement, in §402A, makes ***strict liability*** applicable for damage "to the user or consumer or to his property. . . ." For instance, if a defect in a stove caused it to catch fire, and burn down the plaintiff's house, he could recover for this property damage.

   b. **Negligence:** The same result would follow under negligence theory, assuming that the defendant's failure of due care could be demonstrated.

   c. **Warranty:** But a plaintiff not in privity with the defendant might have trouble suing on an implied warranty; such a suit against a remote seller does not fall within the versions of UCC §2-318 in force in most states, i.e.,

Alternatives A and B. Those sections both apply only where the non-privity plaintiff is injured "in person" by breach of the warranty.

i. **Exceptions:** But Alternative C does not contain this limitation. Furthermore, case law in a particular state may give protection for such property damage, even though this is not within the language of Alternative A or B.

2. **Property damage defined:** Court have not always agreed on what kind of harm falls within this "property damage" class, as opposed to intangible economic harm. Clearly, sudden destruction of plaintiff's property apart from the defective product itself qualifies. Also, if the defect causes the product itself to be destroyed or visibly harmed (e.g., explosion or fire in an automobile due to a defective radiator), most courts would probably say that this was property damage, and thus recoverable in strict liability or negligence.

a. **Loss of bargain:** But if the plaintiff's damages stem from the fact that his product simply doesn't work because of the defect, or is worth less with the defect than it would be without it, courts are in dispute; most would probably treat this as intangible economic harm. See P,W&S, pp. 800-01.

B. **Intangible economic harm:** Where the plaintiff's damages are found to be solely ***intangible economic*** ones, as opposed to personal injury or property damage, the plaintiff will have a much harder time recovering, particularly if he is not suing his immediate seller. The profits lost by a businessman when a piece of equipment failed to work because it was defective would, for instance, be such an intangible economic loss.

1. **Direct purchaser:** If the plaintiff if suing the person who sold the goods to him, his best bet is suing for breach of ***implied or express warranty.***

a. **Measure of damages:** Whether the warranty breached is express or implied, the direct purchaser can recover the difference between what the product would have been worth had it been as warranted, and what it is in fact worth with its defect. (UCC §2-714(2)). He can also recover consequential damages, (e.g. ***lost profits***) if these result from "general or particular requirements and needs of which the seller at the time of contracting had reason to know. . . ." (§2-715(2)).

b. **Strict liability and negligence:** Since the measure of damages in warranty is quite generous to the plaintiff in this position, it is rare that he would want to assert a strict liability or negligence claim. This might, however, happen if the seller had some UCC warranty defense (e.g., a ***disclaimer of liability***). In that event, a court might very well hold that the UCC was intended by the legislature to be the sole remedy for intangible economic harm by a purchaser against his immediate seller, and therefore deny strict liability or negligence recovery.

2. **Remote purchaser:** Where the plaintiff is suing not his own seller, but a remote person (e.g., the manufacturer) he will find it difficult to recover anything if his only harm is an intangible economic one.

a. **Warranty:** A few courts might allow him to recover on implied warranty, particularly states in which Alternative C to §2-318 is in force (although that section may be limited to economic harm resulting from "property damage", not intangible harm.) Most courts, however, would probably deny the implied warranty claim, on the grounds that the plaintiff must sue his own immediate seller for such breaches. See, e.g., W&S, p. 334 ("... We agree with the majority position that generally non-privity plaintiffs may not recover for economic loss.")

   i. **Express warranty:** Of course, if the plaintiff could show that the remote seller or manufacturer had made an ***express warranty*** and breached it, and that he, the plaintiff, was within the class of persons expected to be reached by the warranty, he would have a good chance of recovering under the UCC, even if his harm was only economic. Thus in
   ★ *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), the plaintiff purchaser of a farm truck was permitted to recover from the defendant manufacturer for lost profits, as well as part of the purchase price, when the truck did not live up to the business uses that the defendant had expressly warranted it for. (However, the court indicated that had the plaintiff been suing merely on a strict liability theory, he would not have been permitted to recover for lost profits; since the law generally prevents disclaimers of strict tort liability, it would be unfair to force every manufacturer to be responsible for its ultimate customers' loss of business profits.)

b. **Strict liability:** The remote buyer will not recover for his economic harm in ***strict liability***, in almost all courts that have considered the question. As the court said in *Seely*, *supra*, in rejecting the plaintiff's strict liability claim, a manufacturer should not be held liable for "the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." Observe that §402A of the Restatement limits recovery to cases of personal injury or "property damage", and that lost profits and other intangible economic harm do not fall within this category.

   i. **Rug case:** But one well-known case did, at least in dictum, indicate that a remote plaintiff could recover in strict liability for purely economic harm. In *Santor v. A. and M. Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965), the plaintiff recovered for the fact that a rug was not in the "Grade No. 1" condition it was supposed to be in. The court stated that recovery was appropriate in strict liability, on the grounds that "the great mass of the purchasing public has neither knowledge nor sufficient opportunity to determine if articles bought or used are defective."

c. **Negligence:** Most courts hold that the plaintiff may also not recover in ***negligence*** for pure intangible economic harm. See P,W&S, p. 802.

d. **Combined with other harm:** If the plaintiff can show that he has received

either physical injury or "property damage", he may then be able to "tack on" his intangible economic harm as an ***additional*** element of damages. This would certainly be the case in a negligence action (e.g., profits lost by the plaintiff-businessman when he can't work due to physical injury). It might also be true in a strict liability or warranty action, although this is less likely.

3. **Non-purchaser:** If the plaintiff is not even a remote purchaser, but is rather a ***user*** or ***bystander***, he is at best in the position of a remote purchaser, and possibly in a worse one, with respect to recovering for pure intangible economic harm. He will have to overcome not only the judicial reluctance to award damages for such intangible harm, but also privity requirements remaining in some jurisdictions.

IX. DEFENSES BASED ON PLAINTIFF'S CONDUCT

A. Contributory negligence: The plaintiff's ***contributory negligence*** will obviously be a defense to a products liability claim brought on a negligence theory (or a partial defense, if the jurisdiction has adopted comparative negligence). But is contributory negligence a defense if the claim is brought upon strict liability, or warranty?

1. **Strict liability:** Virtually all courts now seem to agree that there are at least some kinds of "contributory negligence" which are not defenses to a strict liability claim. The courts have divided contributory negligence into several categories, of which only some may constitute defenses:

   a. **Failure to discover danger:** If the plaintiff's contributory negligence lies in ***failing to inspect*** the product, or otherwise failing to become aware of the danger from it, virtually all courts agree that this is ***not*** a defense.

      Example: A ladder manufactured by D collapses, injuring P, who is standing on it. D defends against P's strict liability claim on the grounds that P was contributorily negligent in failing to test the ladder before using it, and failing to keep a proper lookout while he used it. *Held*, these allegations, even if proven, would not constitute defenses to strict liability. As Comment n to Rest. 2d, §402A, indicates, ". . . The user's negligent failure to discover a defect, or to take precautions against the possibility of its existence, is not a defense to a strict liability action." *Findlay v. Copeland Lumber Co.*, 509 P.2d 28 (Ore. 1972).

   b. **Unreasonable exposure to risk:** But if the plaintiff ***learns of the risk***, and nonetheless voluntarily submits to it, this will be a defense to strict liability. In this situation, the defense is really what in negligence cases is called "assumption of risk". The doctrine's application to products liability cases is discussed further *infra*, p. 295.

   c. **Abnormal use:** If the plaintiff's "contributory negligence" consists of his ***abnormal use*** or ***misuse*** of the product, this may be a defense to strict liability, depending mostly on the degree of foreseeability of the use. See *infra*, p. 296.

d. **Independent negligence:** Lastly, the plaintiff's contributory negligence may be, so to speak, an "independent" ***concurring cause*** of the harm. When this happens, the plaintiff will probably be able to recover if he can show that the effect of this independent event was not so unforeseeable or bizarre that it should be considered a "superseding" intervening act.

Example: Suppose P, while driving, negligently fails to keep a lookout, until he is about to run over X. He turns the wheel sharply, and the steering mechanism breaks, sending the car into a telephone pole. In this situation, P's negligence is an independent event, distinct from the defect in the steering mechanism. Yet the court would probably find the manufacturer strictly liable, on the grounds that P's conduct was a reasonably foreseeable concurrent event.

Note: Another way to put the rule is that as long as the manufacturing defect was ***a proximate cause*** (and not necessarily the sole proximate cause) the defendant will not be saved from liability merely because the plaintiff's own negligence is an additional proximate cause. See the brief discussion of causation in products liability cases, *supra*, p. 277, and also the general treatment of intervening causes in negligence actions, *supra*, p. 130.

e. **Comparative negligence statutes:** There is much dispute about whether, in a ***comparative negligence*** jurisdiction, the plaintiff's contributory negligence should result in a proportionate reduction in his strict liability recovery. At least some courts have construed their statutes so as to find them applicable in a strict liability situation; this has the result of reducing the plaintiff's recovery, even if his contributory negligence was of the "failure to discover or provide against the defect" variety. See P,W&S, p. 806.

i. **Uniform Act:** The Uniform Comparative Fault Act, §1(b) and Comment thereto, similarly would reduce the plaintiff's strict liability recovery in proportion to his own degree of fault.

2. **Warranty claims:** Cases involving ***warranty claims*** generally follow pretty much the same rules as to the effect of contributory negligence. For instance, many courts point to Comment 8 to UCC §2-316, which states that ". . . If the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty." (But in cases of consumer goods, the courts tend to keep a narrow limit on the buyer's obligation to examine the goods.) See generally, W&S, pp. 335-39.

B. **Assumption of risk:** The defense of ***assumption of risk*** applies in generally the same way in strict liability cases as in negligence cases. Thus Comment n to Rest. 2d, §402A, states ". . . The form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

1. **Must be voluntary and unreasonable:** But, again as in negligence cases, the plaintiff's use must be both ***voluntary*** and ***unreasonable***.

   ★ **Example:** D sells P a car with a defective seat-belt. P brings the car back for a new belt, but D says that nothing can be done until a new one is received from the factory. While waiting for the new belt to come in, P drives without a belt, and gets in an accident. P sues D in strict liability, and D defends by contending that P was contributorily negligent in driving without the belt, and assumed the risk of harm from doing so. *Held*, P may have "voluntarily" accepted the risk of driving without a belt, but it cannot be said as a matter of law that he was "unreasonable" in doing so. Therefore, the defenses of assumption of risk and contributory negligence do not apply. *Devaney v. Sarno*, 311 A.2d 208 (N.J. 1973)

2. **Warranties:** Assumption of risk is also generally accepted as a defense to warranty actions. See W&S, p. 336.

C. **Abnormal use or misuse:** If the defendant can show that the plaintiff put the product to an ***abnormal use*** or otherwise ***misused*** it, this may be a defense to strict liability. ("Abnormal use" and "misuse" are somewhat overlapping terms; the use is abnormal if it is for a different purpose than that intended by the defendant; the product is "misused" if it is handled in a careless or inappropriate way, even if in furtherance of the overall purpose for which it was designed.)

   Example: P purchases, from a retailer, a set of tires manufactured by D. The retailer tells P that the size he has requested is too large for his car, but P insists, mistakenly believing that the rims on his car are big enough to hold these tires. One of the tires blows out, and P and his family are injured. *Held*, the jury could properly find that P misused the product, and that this misuse was the proximate cause of the blow-out. These findings constitute a defense to P's strict liability claim. *McDevitt v. Standard Oil Co. of Texas*, 391 F.2d 364 (5th Cir. 1968).

1. **Restatement examples:** The Restatement's strict liability section gives a number of examples of misuse or abnormal use which will bar recovery. If there is "abnormal handling" (e.g. "a bottled beverage is knocked against a radiator to remove the cap") or "abnormal preparation for use" (e.g., "where too much salt is added to food") or "abnormal consumption" ("as where a child eats too much candy and is made ill"), there will be no liability. Rest. 2d, §402A, Comment h.
2. **Must not be reasonably foreseeable:** The misuse or abnormal use, to be a defense, must not have been ***"reasonably foreseeable"***. For if it was reasonably foreseeable, the manufacturer will usually be charged with the duty of anticipating it, and making the product safe against it.

   ★ **Example:** P owns a tractor built by D (Ford Motor Co.) Standing beside it, he tries to start it while it is in gear, and it runs him over. The tractor is designed with a starter safety switch which is supposed to prevent it from being started in gear, but P alleges that this device was defective and not functioning. D contends that, in any event, P misused the product, and should be barred from recovering in strict liability.

Held, even though P may have misused the product, his misuse was "reasonably foreseeable". From the very fact that the tractor was designed to prevent its being started in gear, it is clear that Ford must have foreseen that a farmer might try to start it out of gear. Therefore, misuse is no defense. *Ford Motor Co. v. Matthews*, 291 So.2d 169 (Miss. 1974).

3. **Same result by "duty" or "proximate cause" analysis:** Some cases analyze the "misuse" or "abnormal use" problem by treating it as a question of "duty" or "proximate cause", rather than as an affirmative defense similar to contributory negligence. Thus the court in *McDevitt, supra*, might have held for the defendant on the ground that it had no obligation to provide tires that were the right size for any rim; by this analysis, the tires were simply not "defective". Or, it might have held that the size of the tires was not a "proximate cause" of the accident, and that the sole proximate cause was P's driving at high speeds on them when they didn't fit. It will normally not make much of a difference which way the court looks at the misuse problem, except that if the "duty" or "proximate cause" analyses are used, the burden of proof will probably lie on the plaintiff; if this is treated as an affirmative defense issue similar to contributory negligence, the burden of showing misuse will be on the defendant.

   a. **Restatement analysis:** The Restatement apparently favors a "duty" approach to the misuse problem. Thus in the examples of abnormal handling, abnormal preparation, and abnormal use, quoted above from Comment h to §402A, the Restatement's position is that the products in question are simply "not in a defective condition", since they are "safe for normal handling and consumption." §402A, Comment h.

4. **Warranty:** Probably the plaintiff's misuse or abnormal use constitutes a defense to a ***warranty action*** in much the same circumstances as in strict liability. See W&S, pp. 337-339. Cases under the UCC warranty sections are likely to take a "proximate cause" approach to this problem; see, e.g., Comment 5 to §2-715.

5. **Negligence:** In a negligence case, the plaintiff's abnormal use or misuse of a product will be a defense if it constitutes common-law contributory negligence, and also if it constitutes assumption of risk (e.g., the buyer's knowing use of overly large tires in *McDevitt, supra*). The court might also hold that the seller had no "duty of care" to design a product that would withstand such abnormal use or handling.

D. Abnormal use or misuse by third person: If the misuse or abnormal use is done by ***someone other than the plaintiff***, the defendant cannot claim that this constitutes contributory negligence or assumption of risk, since only the plaintiff's conduct can give rise to these defenses.

1. **Use as defense:** However, this action by a third person may still allow the defendant to escape strict liability or warranty liability, either on the grounds that he had no obligation to produce a product that would withstand such use (and the product was therefore not "defective") or on the grounds that the third party's act was an intervening independent cause that was superseding. Thus if the plaintiff in *McDevitt, supra*, had been a pedestrian hit by the car, the

defendant would probably have succeeded in showing that the tires were not defective; he might also have shown that the purchaser/driver's negligence was so great as to be "gross" and therefore superseding. (But keep in mind that ***ordinary negligence*** on the part of the third person is usually not enough to constitute a superseding intervening cause — see *supra*, p. 132.)

X. STATUTE OF LIMITATIONS

A. Statute of limitations: How the plaintiff pleads his claim may have an effect on what ***statute of limitations*** is imposed. If the claim is for negligence, obviously the general tort statute (usually quite short) applies. If the claim is for breach of warranty, normally the UCC's own built-in statute of limitations (§2-725) applies, giving the plaintiff four years from the time of sale of the product in which to sue. But when the claim is based on strict liability, the choice between the general tort statute and the UCC (or its counterpart in non-sales transactions, the general contract statute) is not clear.

1. **Tort statute selected:** The leading case on this question is *Victorson v. Bock Laundry Machine Co.*, 335 N.E.2d 275 (N.Y. 1975). That case held that a strict liability claim, at least where it is brought by a plaintiff not in privity with the defendant, should be governed by the general ***tort*** statute of limitations. Furthermore, the statute should not start to run until the injury occurred. The consequence of this in *Victorson* itself was that the manufacturer of a laundry machine was still liable in tort in 1972, where the machine was installed in ***1948***, and the injury did not occur until 1969. (If the court had chosen the UCC statute of limitations, the claim would have expired in 1952, four years after the sale of the machine, and many years before the injury. The court pointed to the anomaly of holding that the plaintiff's claim could be barred before it ever accrued.)

NUISANCE

I. NUISANCE GENERALLY

A. Confusion surrounding the term: Although courts often use the term "nuisance" as if they were talking about a particular tort, the term really refers to a ***kind of injury*** which the plaintiff has sustained. In the case of "public nuisance", this injury is the loss of any right that the plaintiff has by virtue of being a "member of the public". In cases of private nuisance, the plaintiff's injury consists of interference with his ***use or enjoyment of his land.***

1. Significance of nuisance: Therefore, instead of viewing the rules set forth in this chapter as circumstances under which the "tort" of nuisance may be maintained, the student should instead think of them as definitions of what constitutes sufficiently great damage to the plaintiff that he is entitled to sue. The suit itself may have as a basis any of the types of culpable defendant behavior we have examined so far: (1) intentional interference with the plaintiff's rights; (2) negligence; or (3) abnormally dangerous activities or other conduct giving rise to strict liability.

> **Example:** A gas well being drilled by D explodes, throwing noxious chemicals on P's property. In order to show the kind of damage required for "private nuisance", P must show that his use and enjoyment of his property have been substantially impaired (which he will almost certainly be able to do). But he must also show that D's conduct was either intentional (e.g., D knew that the well was substantially certain to interfere with P's property), negligent (e.g., D carelessly neglected to take adequate safety precautions) or abnormally dangerous.

I. PUBLIC NUISANCE

A. Definition of public nuisance: A "public nuisance" is an interference with ***"a right common to the general public."*** (Rest. 2d, §821B(1)).

1. Lack of more definite rule: Although this definition is not very useful in predicting what kind of rights will be held to be "common to the general public", no better definition is available. Some of the more common things that have been held to constitute public nuisances include: ***health hazards*** (e.g., breeding of diseased animals, or large numbers of healthy animals too close to residential areas, as in *Spur v. Del Webb, infra*, p. 307); maintenance of ***whorehouses***, gambling parlors or unlicensed bars; ***obstruction of public streets***, etc.

2. Factors: The factors which will be looked at in determining whether something is a public nuisance include "the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency, continuity or duration, and the damage or annoyance resulting. . . ."

★ *Culwell v. Abbott Constr. Co., Inc.*, 506 P.2d 1191 (Kan. 1973). In that case, a

nylon string placed across a sidewalk to mark the borders of an excavation site was held not to be a public nuisance, on the grounds that it was "reasonably necessary" for the construction being done, and had been in place only a short period of time before plaintiff tripped on it.

a. **Substantial harm required:** A public nuisance will not be found to exist unless the harm to the public is ***substantial***.

★ **Example:** P (the city of Chicago) sues to enjoin D (a utility in Indiana) from operating an electric generating facility that produces pollution. Since the plant does not exceed federal limits, the suit is brought on common-law nuisance grounds. *Held*, for D. For a condition to be enjoined as a public nuisance, "a substantial harm or injury must be clearly demonstrated." Here, D's compliance with federal pollution guidelines, and the testimony of expert witnesses, both demonstrate that the pollution from the plant, although unpleasant, did not cause substantial harm to the residents of Chicago. *City of Chicago v. Commonwealth Edison Co.*, 321 N.E.2d 412 (Ill. App. Ct. 1974).

3. **Statutes and ordinances:** In addition to types of conduct that are commonly recognized by courts as giving rise to "common law" public nuisance (the examples in (1) above are instances of this), particular ***statutes and ordinances*** in each jurisdiction may make certain things public nuisances (e.g., "black currant plants" — see P,W&S, p. 834).

B. **Requirement of particular damage:** A private citizen may recover for his own damages stemming from a public nuisance, but only if he has sustained damage that is different in ***kind***, not just degree, from that suffered by the public generally.

★ **Example:** The tanker Tamano runs aground, discharging thousands of gallons of oil into the ocean near the town of Orchard Beach, Maine. A class action is brought by commercial fishermen and clam diggers whose livelihood is impaired, as well as by the owners of motels, restaurants, etc., in the town, whose business is dependent on tourism, which has dried up. The complaint is based on a public nuisance theory. *Held*, the fishermen and clam diggers have suffered the requisite "damage different in kind, rather than simply in degree", from that suffered by the rest of the public generally; their own direct exercise of the public right to fish and clam-dig has been interfered with. But the businessmen complain of only an indirect interference with their businesses, based on the drying up of tourism; this is damage that is greater in degree than that suffered by other businesses and residents of the town, but not different in kind. They therefore may not recover for public nuisance. *Burgess v. M/V Tamano*, 370 F.Supp. 247 (D. Me. 1973).

1. **Magnitude of pecuniary loss irrelevant:** In determining whether the plaintiff's damage is different in kind from that suffered by the public generally, the ***magnitude*** of his financial harm is usually irrelevant. See Rest. 2d, §821C, Illustration 12. Thus in *Burgess*, it would not have helped the plaintiff hotel-owners, restaurateurs, etc., to show that their losses were ten times as great as

those sustained by businesses in the community generally, if all businesses suffered somewhat from the indirect effects of the spill on the economy. (But there almost certainly comes a point where the plaintiff's damages are so huge, compared those of the public generally, that the court will conclude that as a practical matter, damages of a different kind have been suffered. The line between "same kind, greater degree" and "different degree" is blurry.)

2. **Injunction:** The requirement of a "different kind" of harm will ***not*** necessarily be imposed in suits for an ***injunction***, as opposed to one for damages. Rest. 2d, §821C, indicates that an injunction may be obtained not only by a plaintiff who could obtain damages, but also by a public official, and by a private citizen who has "standing to sue as a representative of the general public, or as a citizen in a citizen's action or as a member of a class action." (These standing requirements are determined by the local court's civil procedure standing rules).

III. PRIVATE NUISANCE

A. Nature of private nuisance: A ***private nuisance*** is an unreasonable interference with the plaintiff's ***use and enjoyment*** of his land. See Rest. 2d, §822.

1. **Distinguished from trespass:** Whereas trespass is an interference with the plaintiff's right to ***exclusive possession*** of his property, nuisance is an interference with his right to use and enjoy it. For instance, a condition near the plaintiff's property that interferes with his peace of mind (e.g., exposives stored in a dangerous way) would be a nuisance, since it interferes with his use and enjoyment, but not a trespass, since nothing physically enters his property.

   a. **Overlap:** However, it frequently happens that conduct by the defendant is both a nuisance and a trespass. For instance, if the defendant conducts blasting operations near the plaintiff's land, the noise, threat of harm, and vibrations, will all be aspects of nuisance, while the throwing of rocks onto the plaintiff's land (and, in a few courts, even the shock waves themselves — see *supra*, p. 32) will be trespasses.

2. **Must have interest in land:** The critical thing to remember is that plaintiff can sue based on a private nuisance only if he has an ***interest in land*** that has been affected. For instance, the fishermen in *Burgess, supra*, could not have sued for private nuisance, because although their livelihood was affected, no interest in land that they held was affected.

   a. **Tenants and family members:** But the interest in land does not have to be a "fee simple". A ***tenant*** may have such an interest; also, ***members of the family*** of the owner or tenant may sue, on the grounds that they have a *de facto* interest in using and enjoying the land. See Rest. 2d, §821E.

3. **Elements of the case:** The plaintiff must demonstrate two principal elements in order to recover for private nuisance: (1) that his use and enjoyment of his land was interefered with, in a ***substantial way***; and (2) that the defendant's conduct was either negligent, abnormally dangerous, or intentional.

B. Interference with use: The interference with the plaintiff's use and enjoyment must be ***substantial***. Recovery for nuisance is therefore very different from that for trespass (at least where the term "trespass" is used in its modern-day sense to include only intentional invasions) — the trespass plaintiff may recover nominal damages, even where he has suffered no substantial harm (see *supra*, p. 31).

1. **Inconvenience:** If the plaintiff is personally injured, or his property receives physical damage, the interference will always be "substantial". But if the plaintiff's damage consists in his being ***inconvenienced*** or subjected to unpleasant smells, noises, etc., this will be substantial damage only if a person in the community of ***normal sensitivity*** would be seriously bothered.

   a. **Abnormally sensitive plaintiff:** Thus the ***abnormally sensitive plaintiff*** is out of luck. For instance, where the plaintiff was an invalid thrown into convulsions by the ringing of a nearby church bell, he was not allowed to recover; the existence of a nuisance "must be determined by the effect of noise upon people generally, and not upon those . . . who are peculiarly susceptible to it. . . ." *Rodgers v. Elliott*, 15 N.E.2d 768 (Mass. 1888).

   b. **Nature of locality:** What constitutes a "substantial interference" will generally depend in part on the ***neighborhood***. For instance, a plaintiff living in a residential neighborhood will be required to submit to less noise, industrial smells, etc., before these are substantial, than one who lives over a store-front in a busy commercial neighborhood. This is really the same kind of balancing that goes on in determining whether the defendant's conduct is unreasonable (see *infra*).

C. Defendant's conduct: There is no general rule of "strict liability" in nuisance. In other words, the plaintiff must show that the defendant's conduct fell within one of the three principal classes that we have examined thus far, i.e., negligence, intent, or abnormal dangerousness. For this reason, cases holding that certain conduct is an "absolute" nuisance are misleading; see Prosser, p. 582-3.

1. **Negligence:** If the plaintiff wants to base his nuisance claim upon the defendant's negligence, he must meet the same requirements of proof as in any other negligence action. Thus he must show that the utility of the defendant's conduct was outweighed by the harm to the plaintiff (i.e., that the defendant's conduct was ***"unreasonable"***).

2. **Abnormally dangerous:** The plaintiff may be able to show that the defendant's conduct was an "abnormally dangerous activity", giving rise to, in effect, "strict nuisance liability". For instance, if he can show that the defendant had stored explosives near the plaintiff's property in a residential area, this may be sufficient.

D. Intentional: Most nuisance claims arise out of conduct by the defendant that can be called ***"intentional"***. This does not mean that the defendant has ***desired*** to interfere with the plaintiff's use and enjoyment of his land, but simply that he ***knows with substantial certainty*** that such interference will occur. For instance,

a factory owner whose plant spews pollutants and smoke into the air over plaintiff's property will be held to have intended this interference, at least if the plaintiff can show that he put the defendant on notice of what was happening by making a ★ complaint. Thus in *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682 (N.C. 1953), the owners of an oil refinery were held liable for sending "noxious gases and odors" onto the plaintiff's restaurant and trailer park. Liability was imposed despite the fact that defendants may have run the refinery non-negligently.

1. **Unreasonableness requirement:** In nuisance cases based on negligence or abnormal danger, a requirement that the defendant's conduct be "unreasonable" is built-in, because of the very definition of negligence and of abnormal dangerousness (see *supra*, p. 254). But where the defendant's conduct is intentional, the courts have ***also imposed a requirement that it be unreasonable.***

   a. **Significance:** This means that even if the defendant intentionally interferes with the plaintiff's rights, he will have a kind of "privilege" to do so, as long as the interference is not unreasonable. "Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests. Practically all human activity, unless carried on in a wilderness, interferes to some extent with others. . . . It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience, and interference, and must take a certain amount of risk in order that all may get on together. . . ." Rest. 2d, §822, Comment g.

   b. **Balancing test:** To determine whether the defendant's conduct is "unreasonable", courts have traditionally done a simple ***balancing test***, weighing the utility of the defendant's conduct against the harm to the plaintiff. In some cases, this has meant that the plaintiff cannot get damages, ***no matter how substantial the harm to him***, as long as the utility of the defendant's conduct was greater.

      i. **Some lenient courts:** However, even courts purporting to apply this strict balancing test have sometimes gone out of their way to give the plaintiff some compensation, even though, strictly speaking, the utility of the defendant's conduct may have been greater than the harm caused ★ to the plaintiff. For instance, in *Carter v. Lee*, 502 S.W.2d 925 (Ct. Civ. App. Tex. 1973), the P alleged that a neighboring property owner, D1, had developed its land so that surface waters would be diverted onto P's land; the suit also claimed that D2 (the city where the land was located) had wrongfully approved D1's development plan. The court held that verdicts in favor of both D1 and D2 should be reversed as against the weight of the evidence. The court found that the utility of the conduct of D2 (the city) was of lesser magnitude than the damage to P's land, even though the court did not say exactly how it had reached this conclusion.

   c. **Rejected by Restatement:** The Second Restatement has rejected the "balancing test" as the sole test for "reasonableness". Instead, the

defendant's conduct will be unreasonable if ***either***: (1) the harm to the plaintiff outweighs the utility of the defendant's conduct; ***or*** (2) "the harm caused by the conduct is substantial, and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct." Rest. 2d, §826. This idea is rephrased in Rest. 2d, §829A, which states that the interference is unreasonable if it is substantial and ***"greater than the [plaintiff] should be required to bear without compensation."***

i. **Significance:** To put it another way, once the plaintiff shows that the harm is substantial, then no matter how meritorious and socially useful the defendant's activity, the defendant will have to pay for the harm to the plaintiff if it is "unfair" that such payment not be made. The only exception to this is that if there are so many people situated in the same position as the plaintiff that to pay damages to all these people would make it impossible for the defendant to continue his activity, and the utility of that activity outweighs the harm it causes, the defendant will not have to pay.

d. Airport cases: This "pay for the damage despite the utility" approach will probably be applied frequently in cases where landowners try to get damages for operation of an ***airport*** near their property. Up till now, however, such plaintiffs have lost on a nuisance theory most of the time, since the airport operators could almost always show that the utility of having an airport outweighed the harm (through noise, pollution, etc.) to the plaintiffs. Under the new Restatement approach, the airport would have to "pay its own way", unless it can show that paying damages to all potential plaintiffs would put it out of business.

i. **Eminent domain:** Because of the difficulty with nuisance recovery until recently, many airport cases have been decided on a sort of ***"eminent domain"*** theory.

★ **Example:** Ps, landowners near a public airport, sue the airport for pollution, noise, etc. They rely on a provision of the state constitution requiring payment whenever private property is "taken, destroyed, or damaged" by a public body. *Held*, Ps may recover if they can show that the airport constitutes a "direct and substantial invasion" of their property rights, and that their property values have been demonstrably reduced by their proximity to the airport. Such a reduction would represent at least a "damaging", if not a "taking or destroying", of the property values. (The court alluded to, but did not decide, the issue of whether a plaintiff could recover even if it were shown that he paid a lower price for the property in the first place because of its proximity to the airport.) *Alevizos v. Metropolitan Airports Comm. of Minneapolis & St. Paul*, 216 N.W.2d 651 (Minn. 1974).

2. Nature of neighborhood: One important factor in determining whether the defendant's interference is "unreasonable" is the kind of area or neighborhood in

which the defendant and plaintiff are located. The ***zoning*** of the area is likely to be important in this respect.

★ **a. Supermarket operation:** For instance, in *Winget v. Winn-Dixie Stores, Inc.*, 130 S.E.2d 363 (S.C. 1963), the court held that the defendant's operation of a ***supermarket*** was not a nuisance as to plaintiff's residence. The court relied on the fact that the store was located in an area of the city zoned for such use. (The plaintiff's house was just on the other side of the zoning border, in a residential neighborhood, but this was treated as practically irrelevant by the court). However, the court held that the ***manner*** in which the defendant conducted its business (e.g., air conditioning fans directed towards the plaintiff's shrubbery, and use of floodlights after closing hours) was unreasonable.

E. Remedies: The plaintiff may have one or more of three possible ***remedies*** for private nuisance.

1. Damages: If the harm has already occurred, he can recover ***compensatory damages***. If it is not clear whether the harm will continue in the future, he can usually recover only for the damages sustained up till the time of suit, and he must bring successive actions for subsequent harm. But if it appears that the nuisance will probably be a permanent one (e.g., a polluting factory that is likely to stay in business), he can and must recover all damages, past and ***prospective***, in one action.

2. Injunction: If the plaintiff can show that damages would not be a sufficient remedy, he may be entitled to an ***injunction*** against continuation of the nuisance. (Since courts typically regard every parcel of land as having a unique use, the plaintiff will frequently be able to make this showing that compensatory damages are not an adequate remedy).

a. Balancing test: But there is one crucial difference between the showing that the plaintiff must make to get an injunction and that required for damages. Under the new Restatement approach summarized above, the plaintiff can get damages as long as he can show that it is "unfair" for him to bear the harm without payment, even if the utility of the defendant's conduct outweighs the harm to the plaintiff. But to get an injunction, the plaintiff must show that the harm to him (probably added to the harm to others similarly situated — see Rest. 2d, §827, Comment b) actually ***outweighs*** the utility of the defendant's conduct.

★ **Example:** D operates a large cement plant, which employs 300 people, and which cost more than $45 million. Ps, neighboring landowners, sue for nuisance, because of dirt, smoke and vibrations from the plant. A lower court finds that the damage to the Ps totals $185,000. *Held*, an absolute injunction against D should not issue, in view of the great disparity between the economic consequences to D and its employees (as well as the local economy) in closing down the plant, and the consequences to the plaintiffs in allowing it to continue. However, it is fair to require D to pay for the harm it causes, regardless of the utility of the plant. Therefore, a

temporary injunction will be issued, to be suspended if D makes payment of permanent damages to the Ps. *Boomer v. Atlantic Cement Co., Inc.*, 257 NE.2d. 870 (N.Y. 1970).

A dissent contended that the court's holding amounted to "saying to the cement company, you may continue to do harm to your neighbors so long as you pay us a fee for it." Also, the dissent noted, once the damage was repaired, the incentive to find a cure for the pollution would disappear.

3. **Self-help abatement:** In some situations the plaintiff may have the right to use the ***"self-help"*** remedy of ***"abatement"***. That is, he may have the right to enter the defendant's land to remove the nuisance. But he may use only reasonable force to do this, and must ordinarily first complain to the defendant and wait for the latter to refuse to remedy the condition himself. See Prosser, pp. 605-6.

F. Defenses: The defendant may raise a number of affirmative defenses to a private nuisance claim. In particular, we examine here situations in which the ***plaintiff's conduct*** may give rise to the defenses of contributory negligence or assumption of risk.

1. **Contributory negligence:** Where the claim is based on the defendant's ***negligent*** maintenance of a public or private nuisance, contributory negligence
★ will normally be a defense. Thus in the well-known case of *McFarland v. City of Niagara Falls*, 160 N.E. 391 (N.Y. 1928), Judge Cardozo held that where a plaintiff sued for public nuisance when she tripped on a part of the sidewalk negligently poured by the municipal defendant, her contributory negligence would be a defense if it were proven. ". . . Whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance."

   a. **Intentional maintenance of dangerous condition:** This theory allowing contributory negligence as a defense has been extended to situations in which the defendant has ***intentionally maintained*** the dangerous condition, but has negligently failed to realize its danger. Thus a defendant who intentionally kept a weighing machine on the sidewalk, but whose failure to guard against the risk that the plaintiff would trip was merely negligent, was held to be entitled to assert contributory negligence against the plaintiff. *Deane v. Johnston*, 104 So.2d 3 (Fla. 1958).

2. **Assumption of risk:** The defense of ***assumption of risk*** is similarly applicable where the defendant behaved negligently, and possibly where his maintenance of the nuisance was a combination of intent and negligence, as described above. The defense may also apply where the defendant conducted an abnormally dangerous activity (e.g., the plaintiff refuses to heed the defendant's sign that it is conducting blasting activities and that bystanders should stay out).

   a. **"Coming to the nuisance":** One controversial aspect of the assumption of risk defense is whether a plaintiff will be barred if he has ***"come to the***

nuisance", i.e., purchased his property with advance knowledge that the nuisance exists.

i. **Restatement view:** Older decisions sometimes treat "coming to the nuisance" as an absolute defense. But the modern view, exemplified by §840D of the Second Restatement, is that the fact that the plaintiff has come to the nuisance is merely "a factor to be considered" in determining whether the plaintiff wins.

ii. **Locality:** The court is much more likely to hold that "coming to the nuisance" is a defense if the defendant's activity is suitable for the area where it occurs, and the plaintiff's own use is out of step with that area.

★ **Example:** D has operated a cattle feedlot (producing "over a million pounds of wet manure per day") for many years, in a completely rural area outside Phoenix. P, a developer, builds a development called "Sun City", one portion of which adjoins the feedlot. The flies and odor make this portion of the development unhealthy and almost unuseable for residential purposes.

Held, P has "come to the nuisance", and if its interests were the only ones at stake, it would not be entitled either to damages or to an injunction. But since the rights of innocent third parties (the inhabitants of Sun City) are also involved, D will be enjoined from operating the feedlot, and forced to move. However, again because it has come to the nuisance, P will have to ***indemnify*** D for its costs in moving. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

MISREPRESENTATION

Introductory note: Misrepresentation has been discussed in the context of several of the torts we have already examined. For instance, where a negligent representation leads to physical harm (e.g., a truck driver carelessly signalling a motorist to pass him when it is unsafe), an ordinary negligence action may be brought; see *supra*, p. 88. Similarly, if a seller of products makes an express warranty about them, and this warranty turns out to be false (e.g., car with "Shatter-proof windshield — see *Baxter v. Ford Motor Co.*, *supra*, p. 263), a products liability action may be brought. In these situations, the misrepresentation is simply one aspect, one method of accomplishing, the more general tort of negligence, strict liability, etc.

In this chapter, we are concerned with misrepresentations that cause only ***intangible pecuniary loss***. Because courts have always been more reluctant to impose liability for this kind of loss than for direct physical injury or property damage, special rules have grown up governing those misrepresentations that have this effect. Most of this chapter will be devoted to intentional misrepresentation, which corresponds to the common law action of "deceit". The growing willingness of courts also to impose liability for negligent misrepresentation, and, in some cases, for innocent misrepresentation (i.e., strict liability) is also discussed.

INTENTIONAL MISREPRESENTATION ("DECEIT")

A. Common law action: The common law action of ***"deceit"***, or ***"fraud"***, corresponds to what we would call today "intentional" misrepresentation.

1. **Elements of cause of action:** To recover for intentional misrepresentation, the plaintiff must establish the following elements:

   a. A misrepresentation by the defendant;

   b. ***Scienter*** (i.e., a culpable state of mind, either knowledge of the statement's falsity or reckless indifference to the truth);

   c. An intent to induce the plaintiff's reliance on the misrepresentation;

   d. ***Justifiable reliance*** by the plaintiff; and

   e. ***Damage*** to the plaintiff, stemming from the reliance.

   See Prosser, pp. 685-6.

B. Misrepresentation: The defendant must make a misrepresentation to the plaintiff. Normally, this will be in ***words***, (e.g., "The lot that I am selling consists of 26 acres").

1. **Actions:** But the defendant's ***actions*** may also constitute a misrepresentation. For instance, if a used car dealer turns back the odometer on a car from 60,000 to 18,000 miles, he is making a misrepresentation as to the mileage. Rest. 2d, §525, Illustr. 1.

2. **Concealment:** Furthermore, if the defendant intentionally ***conceals*** a fact from the plaintiff, he will be treated the same way as if he had affirmatively misstated that fact. Rest. 2d, §550.

   ★ **Example:** D, the owner of a Cadillac, trades it in to P, a car dealer, as part payment on a new car. Previously the engine block had cracked, and prior to the trade-in D has a service station paint over the cracks to conceal them. *Held*, this is a "positive fraudulent concealment", and D is liable for fraud. *Lindberg Cadillac Co. v. Aron*, 371 S.W.2d 651 (St. L. Ct. App., Mo. 1963).

3. **Nondisclosure:** If the defendant simply ***failed to disclose*** a material fact (as opposed to taking positive steps to conceal it), at common law he was almost never liable for fraud. This was particularly true in cases involving business transactions, where the rule was pretty much "every man for himself" and "caveat emptor".

   a. **Modern view:** But modern courts will impose liability for non-disclosure in some situations, although not as a general rule. The Second Restatement, in §551(2), lists several situations in which one party to a business transaction has an obligation to make disclosure to the other. Among these are the following:

      i. **Fiduciary relation:** Matters which must be disclosed because of a ***fiduciary relationship*** between the two (e.g., a bank and its depositor);

      ii. **Half-truth:** Matters which must be disclosed in order to prevent a ***partial*** statement of the facts from being misleading (discussed below);

      iii. **Subsequent information:** ***Newly-acquired*** information which, if not disclosed, would make a previous statement misleading; and

      iv. **Facts basic to transaction:** Most importantly, ***facts basic to the transaction***, if the party with knowledge "knows that the other [party] is about to enter into [the transaction] under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably expect a disclosure of those facts." (§551(2)(e)).

   b. **Termite cases:** The duty to disclose is frequently invoked in ***"termite"*** cases. Thus in *Obde v. Schlemeyer*, 353 P.2d 672 (Wash. 1960), a homeowner selling his home was held liable to the purchaser for his failure to tell the latter that the house had had termites, and that it was not yet clear whether extermination attempts had been successful.

      i. **Contrary to common law rule:** This result is contrary to the common ★ law rule. Thus in *Swinton v. Whitinsville Savings Bank*, 42 N.E.2d 808 (Mass. 1942), no liability was found on similar facts; (the plaintiff's case was, if anything, more compelling than in *Obde*, since apparently there had been no extermination). The court cited the "rule of non-liability for bare nondisclosure".

c. **Rescission:** Although the plaintiff's ability to get ***damages*** for nondisclosure is even today, as noted, somewhat limited, he has always been able to obtain ***rescission*** (i.e., a cancelling of a contract) for nondisclosure of a material fact. Thus if the plaintiff in *Swinton* had brought an equitable action to rescind the contract, he probably would have won.

d. **Extension to other defects:** Courts have become more lenient in what they consider a ***"basic fact"*** required to be disclosed. Thus a real estate developer who sold lots without indicating that the land had such a heavy salt content that shrubbery or trees could not be grown on it, was held to
★ have failed to disclose a basic fact, and was therefore liable. *Griffith v. Byers Constr. Co. of Kansas, Inc.*, 510 P.2d 198 (Kan. 1973). (The court also held it irrelevant that the plaintiffs had not bought directly from the defendant, but had instead purchased through the company that constructed the house; the plaintiffs were "within a class of persons that [the defendant] intended to reach". See the discussion of third-party reliance, *infra*, p. 312.)

e. **Half-truth:** A statement which is literally true, but which is misleading, may be a misrepresentation. Such a statement is what most people think of as a ***"half-truth"***.

★ **Example:** D, the franchisor of a chain of employment agencies, tells P, a prospective franchisee, that "there is no office in Portland" (where P wants to operate), that D is "expanding to the West Coast area. . . .", and that D has "never closed an office." D fails to say that it has just cancelled an existing franchise in Portland.

Held, these misleading statements were half-truths, and constituted a misrepresentation as to whether D had ever done business in Oregon. *Sheets v. B & B Personnel Systems of Oregon, Inc.*, 475 P.2d 968 (Ore. 1970).

f. **Non-disclosure by buyer:** Courts have almost never held that a ***buyer*** has a duty to disclose, even if he knows that the item is much more valuable than the seller thinks it is. See Prosser, p. 698.

C. **Scienter:** To maintain the common law action of deceit, the plaintiff must show that the defendant had that culpable state of mind called ***"scienter"***.

1. **What constitutes scienter:** The defendant acted with scienter if he either:

a. knew or believed that he was not telling the truth; or

b. did not have the confidence in the accuracy of his statement that he stated or implied that he did; or

c. knew that he did not have the grounds for his statement that he stated or implied that he did.

See Rest. 2d, §526.

2. **Negligence not enough:** The main function of the *scienter* requirement is to prevent merely ***negligent*** misrepresentations from being actionable. This rule was derived from the well-known case of ***Derry v. Peek***, set forth in the following example.

   ★ **Example:** Ds, who are directors of the Plymouth, Devonport & District Tramways Co., issue a prospectus in order to obtain capital for the company. The document states that the company has obtained, by special Act of Parliament, the right to use steam power to run a tramway, and that this will make the line more efficient than ones operated by horses. P buys shares in reliance on this prospectus. It turns out that the consent of the Board of Trade is necessary for use of steam power, and the Board refuses to allow steam over most of the line. The company goes bankrupt, and P sues the Ds in deceit.

   Held, "In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. . . . Making a false statement for want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." Since there was evidence that the Ds expected to receive the approval of the Board of Trade as a matter of course, their representation was not fraudulent. (But, it was noted, if the Ds had "shut [their] eyes to the facts", they would have lacked an actual belief in the truth of their statements, and would be liable for deceit.) *Derry v. Peek*, 14 App. Cas. 337 (Eng. 1889).

   a. **Why negligence action not used:** Since the plaintiff in *Derry* could have shown that the directors made their representations negligently, one might wonder why he did not bring an ordinary negligence action. The answer is that until recently, recovery was not allowed in ordinary negligence actions for pure intangible economic loss, without any personal injury or other direct physical damage. (This rule also has implications in products liability, which are discussed *supra*, p. 292.)

      i. **Rescission:** If the plaintiff, instead of bringing a deceit action, merely wants to ***rescind*** a contract which he has been induced to make by means of misrepresentations, he has a much easier task. In this situation, the courts have always been willing to allow rescission merely on a showing of ***negligent*** misrepresentation. Thus even the *Derry* court itself noted that "Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand."

3. **Stating belief as knowledge:** If the defendant says that he knows something to be the case when in fact he doesn't know whether it is the case or not, this will furnish the necessary scienter.

★ **Example:** The Ds, officers of a corporation, tell P, one of the company's creditors, that the company is making money; they also send him some financial statements. In reliance, P refrains from collecting his debt, and even makes a further sale. In fact, the company has been losing money, not making it, and the financial statements are incorrect. *Held*, the Ds did not know whether the company was making money or not, and their statement that it was was a fraudulent misstatement. This is so not because their statement was false, but because they "represented a mere belief as knowledge". *Sovereign Pocohontas Co. v. Bond*, 120 F.2d 39 (D. C. Cir. 1941).

Note: The court in *Sovereign Pocohontas* also indicated that the defendants were liable for having made misstatements in "reckless disregard of the truth". However, such "reckless disregard" does not, strictly speaking, fall within any of the three categories of fraudulent misrepresentation listed by the Second Restatement.

4. **Negligent and innocent misrepresentation:** Many courts have now either relaxed or abandoned the strict scienter requirement, and allow recovery for negligent misrepresentation, and even in some instances for innocent misrepresentation (i.e., strict liability). These theories of recovery are discussed *infra*, pp. 321 and 325, respectively.

D. Right of third persons to recover: Can a plaintiff ever recover if the fraudulent misrepresentation was made not to him, but to some other person? The traditional common law rule has been that the defendant is only liable to those persons whom he has ***intended*** to influence by his misrepresentation, and not to others, even though their reliance may have been foreseeable.

1. ***Peek v. Gurney:*** This rule was enunciated in *Peek v. Gurney*, 6 H. L. 377 (Eng. 1893), which involved the same tramway, and the same prospectus, as *Derry v. Peek, supra*, p. 311. In *Peek v. Gurney*, the directors were sued by someone who had bought the tramway stock not as an original issue, but from a shareholder. The court denied liability on the grounds that the directors had not intended to influence such secondary purchasers by the prospectus.

a. **Credit statements:** This principle often shielded from liability a debtor who made false statements in order to obtain ***credit***.

★ **Example:** Ds hire Construction Co. to make improvements on their home, and give it a negotiable promissory note for $1822 in payment. To obtain this credit, they give Construction Co. a financial statement listing only one debt, when they in fact have many. Construction Co. then uses the financial statement to sell the note to P, which sues for misrepresentation when the note is not paid. *Held*, even if the Ds knew that Construction Co. would probably (or even definitely) repeat the credit representations to a

third person, this is insufficient to make them liable to that third person. To be liable, Ds must have ***intended*** this repetition, which they did not. *Metric Investment, Inc. v. Paterson*, 244 A.2d 311 (N.J. App. Div. 1968).

2. **Relaxation of rule:** However, this rule requiring intent to induce reliance has been relaxed substantially in recent years. The Second Restatement recognizes a number of circumstances in which a person will be liable for misrepresentations to one other than the recipient, even though not made for the purpose of inducing the plaintiff to rely. The most important of these are the following two:

   a. **Use in commercial document:** One who incorporates a misstatement in a ***commercial document*** (e.g., a negotiable instrument) is liable to anyone who suffers loss through his justifiable reliance on the truth of the statement. For instance, a company which markets clover seed in bags intentionally labelled "alfalfa seed" would be liable to anyone who planted the seeds in reliance on the label, and suffered loss, whether the company "intended" to reach that person or not. Rest. 2d, §532, Illustr. 2.

   b. **"Reason to expect":** The defendant is liable to any member of a "class of persons" whom he has "reason to expect" will rely on the misrepresentation, if the reliance occurs in the "type of transaction" which he has reason to expect them to engage in because of such reliance. Rest. 2d, §531. In other words, the plaintiff to whom no misrepresentation has been directly made must, in order to recover under this section, show two things:

      i. that he is a member of a class which the defendant had ***reason to expect*** would be induced to rely; and

      ii. that the transaction is of the same sort that the defendant had reason to expect would occur in reliance.

   c. **Change from former law:** The Restatement's position is thus more liberal than that of most earlier cases, such as *Peek v. Gurney* and *Metric Investment.*

      i. **Effect on *Metric Investment:*** Thus the Restatement test would probably make the defendants in *Metric Investment, supra*, liable, since they probably had "reason to expect" that there would be repetition (in view of the fact that the accompanying promissory was negotiable).

      ii. **Not same as foreseeability:** But even the Restatement's test is not the same as one based on "foreseeability". The reliance by the third person must be more than foreseeable; it (or other reliance by other similarly situated plaintiffs) must be "expectable". (The Restatement leaves a Caveat to §531 as to whether there may be circumstances in which mere "foreseeability" will be enough.)

   d. **Negligent misrepresentation:** In jurisdictions recognizing the possibility of an action for ***negligent*** misrepresentation, courts have understandably been even more reluctant to find liability to persons with whom the defendant has not dealt directly. See the discussion of this question, including the treatment of *Ultramares v. Touche Niven & Co., infra*, p. 323.

E. Justifiable reliance: The plaintiff must also show, to establish deceit, that he in fact ***relied*** on the misrepresentation, and that his reliance was ***justifiable***.

1. Causal question: With respect to the "reliance in fact" aspect of this requirement, the principal issue is whether the plaintiff has relied when he has made an additional ***investigation*** on his own, and his action is the product of reliance both on the misrepresentation and on his own investigation.

a. Misrepresentation need not be sole factor: In this situation, it is generally held that the plaintiff has met the reliance requirement, as long as the defendant's misrepresentation was a ***substantial factor*** in inducing his reliance, despite the fact that his own investigation also was a substantial factor. See Rest. 2d, §546, Comment b and Illustr. 2.

i. Reliance solely on investigation: But if, after receiving the defendant's misrepresentation, the plaintiff makes his own investigation, and relies totally or almost totally upon this investigation, he will be held not to have met the reliance requirement. Rest. 2d, §547(1).

2. Justifiability of reliance: The plaintiff must also show that his reliance was ***justifiable***. Many of the cases involving the justifiability of reliance involve opinions, statements of "law", and predictions and statements of intention; these subject areas are discussed at various places later in this chapter.

a. Duty to inspect: Apart from these issues, the principal question is whether it is ever unreasonble for the plaintiff to rely on the defendant's representations without making an ***independent investigation*** of his own.

b. No general duty to investigate: In general, the plaintiff has no duty to investigate on his own, even where an investigation could be easily done, and would disclose the falsity of the defendant's statements. Thus in a case in which a seller of land lied to the buyer about the number of acres in the plot being sold, the court stated, "Due diligence does not require that the vendee should suspect the vendor of lying, nor that the vendee should survey and measure the land to prevent being deceived by the lies of the vendor."
★ *Judd v. Walker*, 114 S.W.2d 979 (Mo. 1908).

i. Disbelief by court: However, in some cases the court may simply disbelieve the plaintiff's claim that the representation in question was made, or his claim that he relied on it. In such situations, for procedural reasons courts may hold that the plaintiff could so easily have investigated that his failure to do so made his reliance unreasonable.
★ Thus in *Williams v. Rank & Sons Buick, Inc.*, 170 N.W.2d 807 (Wisc. 1969), the plaintiff claimed that he had requested an air conditioned car from the defendant used car dealer, and that during a test run of the car, he did not discover that it was in fact not air conditioned. The court held that the plaintiff's failure to take his "ample opportunity" to determine whether there was air conditioning made his reliance unjustifiable. However, the real explanation of this holding is probably that by so

ruling, the court (an appellate court) could set aside the result; the court's disbelief of the plaintiff's story, on the other hand, would not have been enough to overturn the verdict, since such issues of credibility are left to the jury. (See P,W&S, p. 932, note 1).

c. **Obvious falsity:** Although the plaintiff seldom has a duty to investigate, he does have a duty not to overlook the ***"obvious"***. Thus Rest. 2d, §541, Comment a, makes the plaintiff's reliance unjustified if the representation's falsity "would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." The court in *Williams v. Rank, supra*, might have relied on this section, since certainly it would have taken only a "cursory examination" to disclose that there was no air conditioner in the car.

i. **Contributory negligence:** But the plaintiff's ***contributory negligence*** is not by itself a defense to a deceit action. The fact that a man of reasonable prudence would not have believed the defendant's misrepresentation is irrelevant, as long as its falsity is not obvious.

3. **Materiality:** The plaintiff must also show that the fact he relied on was ***material*** to the underlying transaction. For instance, if the defendant, acting as agent, sells the plaintiff a tract of land, and in so doing falsely states that his principal has red hair, the plaintiff will not be able to recover in deceit, since the representation was not material. (See P,W&S, p. 933, note 7).

a. **What is material:** Generally, a representation is material if a "reasonable man would attach importance to [its truth] in determining his choice of action in the transaction in question." Rest. 2d, §538(2)(a).

i. **Special knowledge by defendant:** In addition to this, if the defendant has some reason to know that the plaintiff attaches a particular importance to the fact in question, even though a reasonable man would not do so, the representation will be treated by the court as material. Rest. 2d, §538(2)(b). For instance, if the defendant knew that the plaintiff believed in astrology, and induced him to buy stock in a particular company by falsely stating that the horoscopes of all the company's officers predicted success, the representation would be held to be material. Rest. 2d, §538, Illustr. 1. (Observe the Restatement's implicit position on the reasonableness of believing in astrology!)

F. Opinion: Courts have always been reluctant to allow a plaintiff to recover based on any statement that could be called an ***"opinion"***. For instance, where the defendant sold the plaintiff some farm land by saying that it contained "about" 150 acres of timber, that the timber could be sold for $4 per cord, and that the land could be cultivated so as to produce 100 bushels of potatoes per acre, these were held to be "speculative expressions of opinion", and "mere trade talk"; they were therefore not ★ actionable. *Saxby v. Southern Land Co.*, 63 S.E. 423 (Va. 1909). This was so even though the defendant may have known perfectly well that there were less than 150 acres of timber, that the wood would not bring $4 per cord, or that an acre would never produce 100 bushels of potatoes.

1. **More liberal rule:** Today, courts are somewhat more willing to allow suit based on a false expression of opinion than they were in the time of *Saxby*. It is still generally true that even if the defendant says that something is his opinion, when it is really not his opinion, the plaintiff cannot recover in deceit. However, in a few situations, modern courts are sometimes willing to recognize the possibility that reliance may be justified.

2. **Opinion of adverse party:** Where the defendant was an ***"adverse party"*** to the plaintiff at the time of the misstatements (e.g., buyer and seller, or any other pair of negotiating parties), Rest. 2d, §542, lists the following situations in which the plaintiff may be justified in relying on the defendant's expression of opinion:

   a. **Special knowledge:** The defendant "purports to have ***special knowledge*** of the matter" that the plaintiff does not have;

      i. **Jewelry dealer:** Thus a jewelry dealer who tells an ignorant customer that a particular stone is worth $2,000 could be sued, on the theory that he "purports to have special knowledge" as to the value of stones.

   b. **Fiduciary relationship:** The defendant "stands in a ***fiduciary*** or other similar relation of trust and confidence" to the plaintiff;

   c. **Confidence:** The defendant "has successfully endeavored to secure the ***confidence***" of the plaintiff;

   d. **Other:** There is some other "special reason" to expect that the plaintiff will rely on the defendant's opinion.

      i. **Defendant knows of plaintiff's gullibility:** For instance, if the defendant knows that the plaintiff is particularly ***gullible*** or unintelligent, and therefore has reason to believe that the plaintiff will be misled by a false statement of opinion, this will be actionable. This would be a "special reason" to expect the plaintiff to rely; see Rest. 2d, §542, Comment i.

3. **"Puffing" still not actionable:** ***"Puffing"***, or ***"trade talk"***, is still not actionable under the Restatement test. Thus if a car dealer says, "This is the best little two-door car you're gonna find for the money anywhere on the market", the plaintiff can't sue even if he can prove that the dealer doesn't really believe that the car is a particularly good one. Rest. 2d, §542, Comment e.

4. **Opinion of apparently disinterested person:** Where the opinion is expressed not by one of the parties to a business deal, but by someone whom the plaintiff reasonably perceives as being ***"distinterested"***, courts are much more willing to find the plaintiff's reliance on it reasonable.

   a. **Rationale:** Whereas in the "adverse party" situation discussed above, the plaintiff is presumed to understand that his adversary is likely to stretch the truth to make the deal, this factor is not present where the defendant seems to be disinterested. See Rest. 2d, §543.

   ★ **Example:** D buys a pair of shoes manufactured by D1. When she wears the

shoes on her vinyl kitchen floor, she slips, and hurts herself. She sues not only D1, but also D2, a publisher who publishes Good Housekeeping Magazine, which has given the "Good Housekeeping Seal of Approval" to the shoes. D2 is on record as stating that it has satisfied itself that products receiving the Seal of Approval are "good ones". *Held*, for P against D2. Since D2's purpose in granting Seal of Approval to products was to induce people to buy them, it will not be heard to say that its representation that the product was a "good one" was merely opinion. D2 "held itself out as a disinterested third party which had examined the shoes, found them satisfactory, and gave its endorsement. By the very procedure and method it used, [D2] represented to the public it possessed superior knowledge and special information concerning the product it endorsed." Therefore, D2 can be liable for negligence. *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969).

5. **Opinion implying fact:** The above discussion applies only to those opinions which are "pure opinion", and which do not state or imply concrete facts. There are, however, many opinions which do either ***express or imply facts.*** When such an opinion is given, the plaintiff may be able to establish that his reliance on such expressed or implied facts is reasonable.

   a. **Lack of knowledge of inconsistent facts:** Thus an opinion will often contain an implied statement that its maker knows of no facts ***incompatible with*** that opinion. If the plaintiff can show that the defendant was in reality aware of facts incompatible with his opinion, he may be able to recover. See Rest. 2d, §539(1)(a). Thus in *Ragsdale v. Kennedy*, 209 S.E.2d 494 (N.C. 1974), a corporation's president, in an attempt to sell his stock, stated that the company was "a gold mine". The court held that if a jury found that the president knew that the company had been losing money, it could also reasonably find that his representation was deceitful.

   b. **Line between opinion and fact:** Also, it does not take much to cross over the line from opinion to statement of fact. Thus while a simple ***statement of value*** (e.g. "This land is worth $5,000 per acre") is an opinion, "Land just like this is selling for $5,000 across town", "I paid $4800 for this land last year", and "I've already been offered $4950 for this acre" are all statements of fact, and the plaintiff can sue and win on a deceit theory if he can show that the defendant knew they were false. See Prosser, pp. 723-4. See also P,W&S, p. 937.

   ★ **Example:** D, the manufacturer of a vacuum cleaner line, sells P equipment for making the vacuum cleaners, and the patents to them. D claims that the machines are "absolutely perfect in even the smallest detail", that they will last a lifetime, that their use of water power is the most efficient form of cleaning, etc. D also represents that these vacuum cleaners have never before been sold on the market. After the deal is done, P comes to disagree with this evaluation, and sues for deceit. *Held*, the claims of quality are mere "puffing" or "dealers' talk", and are not actionable. This is so because

P, as purchaser of the business, had ample opportunity to check out the claims. (A similar result, the court indicated, might not be reached if P were merely a consumer buying one machine.) However, the statement that no cleaners had been sold previously went beyond the realm of opinion, and P is entitled to recover if he can prove that sales were made. *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853 (2d Cir. 1918).

G. Statements as to law: Statements as to ***questions of law*** were almost always held to be opinions, and therefore not to be relied upon, at common law.

1. **Modern view:** But today, statements involving legal principles are generally treated the same as any other kind of statement. For instance, if the statement is fairly read as being solely an opinion, it may be relied on only in those limited circumstances discussed *supra*, p. 316. Rest. 2d, §545(2).

   a. **Implied factual statement:** The most important consequence of this more liberal rule is that if the defendant's representation of law includes an implied statement as to ***factual matters***, the plaintiff may rely upon this implied statement as he could upon any other factual representation. Rest. 2d, §545(1).

   ★ **Example:** D, when he sells a house to the Ps, tells them that it meets all "minimum code requirements", such as those for electric wiring, plumbing, and sewage disposal. When this turns out not to be the case, Ps sue for fraud. *Held*, although the representations had a legal aspect, they were essentially statements as to a factual matter (i.e., whether work was of a certain quality). "The plaintiffs are not relying on their ignorance of the law but of the facts, and the alleged representations carried with them the implication that the facts were otherwise than the evidence shows them to have been." Therefore, a fraud action may be maintained. *Sorenson v. Gardner*, 334 P.2d 471 (Ore. 1959).

H. Prediction and intention

1. **Prediction:** If the defendant ***predicts*** that a certain thing will happen, this will almost always be held to be merely an opinion, and is at best something that can relied upon only in those situations where other opinions could be relied on (e.g., a fiduciary relationship between defendant and plaintiff). Thus if the defendant, trying to sell the plaintiff a piece of land, says "The value of this parcel is bound to increase 20% a year for the next ten years", the plaintiff will almost certainly be unable to establish that his reliance was justifiable.

   a. **Defendant's lack of knowledge of contrary facts:** But as with other opinions, such a prediction generally contains an implicit statement that the maker knows of no facts inconsistent with it. Thus if the defendant land-seller mentioned above knew that the property was likely to be condemned, or to sink in a marsh, his statement about value would probably be held to be actionable. (In any event, plaintiff could also probably show "fraudulent concealment"; see *supra*, p. 309.)

2. **Intention:** But where the defendant, instead of making predictions about things beyond his control, makes a statement as to his own ***intentions***, plaintiff's reliance will often be justifiable. As one well-known statement put it, "The state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, L.R. 29 Chi. Div. 359 (Eng. 1882).

   a. **Means of avoiding contract defenses:** One party to a contract will often try to avoid various ***contract defenses*** by suing on a theory that the other party never intended to keep the contract, and therefore fraudulently misstated his intent to do so. Where the necessary intent can be shown, most courts hold that neither the Statute of Frauds, the parol evidence rule, the illegality of the transaction, lack of consideration, or any other contract defense will bar liability. See P,W&S, pp. 951-2.

   ★ **Example:** As part of a transaction, D promises P that he will pay a $500 mortgage so that P will not have to pay it. He fails to do so, and P sues on the theory that D never intended to keep the promise, even at the time he made it. (P couldn't sue for breach of contract, because of the Statute of Frauds). *Held*, if D never intended to keep the promise, this was a fraudulent misrepresentation which is actionable. Furthermore, the Statute of Frauds does not bar the suit. *Burgdorfer v. Thielemann*, 55 P.2d 1122 (Ore. 1936).

   b. **Statement as to intent of others:** Essentially the same rules apply to statements as to the present intentions of ***others***; if the plaintiff can show that the defendant has knowingly misstated these intentions, he will have an action for fraud.

   ★ **Example:** D, in order to induce P to rent a hotel from him, states that a railroad company will complete a railroad near the hotel and have it running by a certain date, thus enhancing the hotel's value. *Held*, although this is a statement about intentions, it may still be sued on if D knew it was false, since it was reasonably understood as stating a fact about the railroad company's present plans. But D's statement that the railroad would make the hotel and its surrounding area "an important summer resort for people living [in Minneapolis], rested wholly in conjecture and speculation", and was therefore an opinion which could not justifiably be relied on. *McElrath v. Electric Investment Co.*, 131 N.W. 380 (Minn. 1911).

I. Damages

1. **Proximate cause:** Once the plaintiff has met the requirements for deceit, he may recover any damages which are found to have been ***proximately caused*** by the defendant's misrepresentations. He must show that he sustained actual damages, and may not recover nominal ones (as he could for other intentional ★ torts; see *supra*, p. 8). See *Casey v. Welch*, 50 So.2d 124 (Fla. 1951).

   a. **Decline in value:** The issue of proximate cause arises most frequently in situations where the plaintiff has purchased stocks or bonds in reliance on a misrepresentation about them, and their market value declines due to causes

entirely ***unrelated*** to the misrepresented matters. Despite the fact the misrepresentation is the "but for" cause of plaintiff's loss in this situation (i.e., if there had been no misrepresentation, the plaintiff would not have purchased, and would not have been in a position to suffer losses), such recovery is generally ***not allowed***, on the grounds that the loss was not a "reasonably foreseeable" result of the misrepresentation. See Rest. 2d, §548A.

★ **Example:** D1, the owner of some county bonds, and D2, a bond broker, both assure P that all initial purchasers of the bonds have paid the county in full (a fact which tends to increase their value). At the time P makes its purchase, the bonds have in fact not been paid for by the original purchasers, but they do make payment shortly thereafter. Then, for entirely unrelated reasons, a court holds that the bonds were not validly issued. Because the bonds are worthless, the county reimburses P for what it paid for them, but not for the broker's fee charged by D2. P sues both D1 and D2 to recover this fee.

Held, D1 is not responsible for P's loss, since the invalidity of the bonds was completely unrelated to whether they had been paid for prior to the time P bought them, and P's loss was therefore not a proximate result of D2's statement. (But P may recover the fee from D2, not as damages for fraud, but as restitution for the fact that invalid bonds were sold.) *Boatmen's National Co. v. M. W. Elkins & Co.*, 63 F.2d 214 (8th Cir. 1933). See also, Rest. 2d, §548A, Illustr. 1, drawn from this case.

2. **Measure of damages:** Courts have applied essentially two different ***measures*** of damages: (1) one which attempts to put the plaintiff in the position he was in before the misrepresentation (which in contract law would be called the "reliance" measure — see Emanuel Outline of Contracts); and (2) one which, where the plaintiff and defendant have made a contract, puts the plaintiff in the position he would have been in had the misrepresented facts been true (in contracts, the "benefit of the bargain" or "expectation" measure).

   a. **Reliance measure:** About 12 courts consistently apply the reliance measure in all deceit actions. (Prosser, p. 734). Thus if the defendant fraudulently induces the plaintiff to buy an object for $10,000, and it is really worth only $7,000, the reliance or "out of pocket" recovery is $3,000. This is so regardless of whether the entire $3,000 discrepancy is due to the fact that the object was not as warranted, or is rather due in part to this but also in part to the fact that the plaintiff would have made a bad bargain anyway, even without the misrepresentations (e.g., by paying $10,000 for something worth only $9,000).

   b. **Benefit of the bargain:** A majority of American courts, however, give the plaintiff his "benefit of the bargain" or "expectation" damages, at least in those situations where the defendant is someone with whom he has made a contract. These courts reason that even though the deceit action is not on the contract, it is fair to give the plaintiff the contract measure of damages, and to punish the defendant. Thus if the plaintiff paid $10,000 for something

worth $7,000, and the thing would have been worth $15,000 if the misrepresentations about it had been true, the plaintiff will receive damages of $8,000 from these courts (i.e., the difference between what the item was worth in reality, and what it would have been worth if it had been as represented).

i. **Repair bill as estimate of expectation damages:** The plaintiff seeking the benefit of his bargain will often have a hard time showing what the actual value of the product was (as opposed to what it would have been worth if it had matched the representations made about it). In this situation, he will sometimes be able to recover the costs of ***repairing*** it to bring it up to the condition it was represented to be in. Thus the purchaser of a car which was represented to be new, and which had in fact been in a previous accident, was allowed to recover the $800 that an expert witness said would have been required to bring the
★ damaged parts into nearly new condition. *Hinkle v. Rockville Motor Co., Inc.*, 278 A.2d 42 (Md. 1971). In such a situation, the court simply accepts the cost of repair as an adequate estimate of the difference between what the product was really worth and what it would have been worth if it had been as represented. (But this will sometimes be a misleading figure, as where the costs of repair are much greater than any real increase in value that would occur).

c. **Restatement view:** The Second Restatement, in §549(2), allows the "benefit of the bargain" measure where expectation damages are "proved with reasonable certainty".

d. **Where reliance damages greater:** In some situations the reliance measure will be ***greater*** than the expectation measure (as where the plaintiff has made such a bad bargain that even if the item had been as represented, it would still not have been worth what he paid for it). In this situation, all courts agree that the plaintiff has the option of choosing to recover reliance damages. That is, he will receive the difference between what he paid and what the product was really worth.

e. **Consequential damages:** The plaintiff may also recover ***consequential*** damages. For instance, where the plaintiff was sold a horse which was represented to be gentle, and which kicked him, he was allowed to recover for his injuries. *Vizena v. Souliere*, 152 A. 798 (Vt. 1931). See P,W&S, p. 956.

II. NEGLIGENT MISREPRESENTATION

A. Historical view: *Derry v. Peek, supra*, p. 311, established that the action of deceit could not be used for a misrepresentation that was merely negligent, rather than intentional.

1. **Direct physical damage required:** Nor, until recently, could the victim of a negligent misrepresentation bring an ordinary negligence action when only his intangible economic interests had been harmed. That is, to bring a conventional

negligence action, the plaintiff had to suffer either personal injury or direct property damage, not mere intangible economic harm (e.g., lost profits, or a bad contract).

2. **Changing view:** But in the last ten or fifteen years, most American courts have begun to allow some kind of recovery for ***negligent misrepresentation***, even where only intangible economic harm is suffered. Some courts have done this by allowing a special action for "negligent misrepresentation" analogous to deceit; others have simply assimilated the intangible-harm case into the conventional negligence action.

   a. **Same requirements:** In either case, most requirements for the action are generally the same as for a deceit action. For instance, the plaintiff must show that his reliance was justifiable, and the standards for justifiability are at least as strict as in deceit.

B. Business relationship: The courts have been most willing to allow recovery for negligent misrepresentation where the defendant's statements are made in the course of his ***business or profession***, and he had a ***pecuniary interest*** in the transaction.

★ **Example:** P, an importer, is expecting goods to come in by ship to be stored by D. P wants to insure the goods, so he calls D, and asks whether and where they are stored; he is told that they have been docked and are stored at "Dock F, Weehauken". He gives this information to the insurance company to get insurance. It turns out that the goods have not yet arrived; when they do, they are stored at Dock D, not F, and are then destroyed by a fire. P can't collect on the insurance because of the misdescription, so he sues D.

Held, P may recover for this negligent misrepresentation. P and D were not strangers; instead, they had a bailor/bailee business relationship. This relationship was enough to give D the burden of exercising due care in his statements. *International Products Co. v. Erie R.R. Co.*, 155 N.E. 662 (N.Y. 1927).

1. **Direct compensation not required:** Most courts, and the Second Restatement, hold that it is not necessary for the plaintiff to show that the defendant ***directly*** received compensation in the transaction giving rise to the misstatements. See Rest. 2d, §552, Comment d. For instance, if a prospective client comes to a lawyer's office, and as part of a "free first consultation", is negligently given incorrect advice, he may sue, despite the fact that he has not paid for the services.

   a. **Curbstone opinion:** But where a statement is made totally outside of the defendant's usual business or professional work, there is no liability. Thus in the case of a ***"curbstone opinion"***, "as when an attorney gives a casual and offhand opinion on a point of law to a friend whom he meets on the street", there is no liability. Rest. 2d, *ibid.*

C. Liability to third persons: The maker of ***fraudulent*** misstatement will be liable not only to the recipient of the statement, but to any person who the maker has

"reason to expect" may rely on it. (*Supra*, p. 313). But the maker of a negligent misrepresentation is liable only to a ***much narrower class of third persons.***

1. **Persons intended to be reached:** The Second Restatement, in §552(2), makes the defendant liable to a ***"limited group of persons"*** whom the defendant ***intends to reach*** with the information, or whom he knows the ***recipient intends to reach.*** That is, whereas the fraudulent misrepresenter is liable to anyone whom he should have "reason to expect" will learn about the statement and rely on it, the negligent misstater is liable only to a limited group, and that group must be composed of persons whom the defendant either intends to reach or knows that the recipient intends to reach.

   ★ **Example:** D, a firm of accountants, negligently prepares a certified audit of the books of X Corp. D is aware that the results of this audit will be shown to banks, factors, and other persons from whom X wants to borrow money (but is apparently unaware of the precise identity of any of these potential creditors.) In reliance on the audit, P, a factor, lends money to X, which goes bankrupt. P sues D for negligent misrepresentation.

   Held, D had no duty of care to P, and therefore cannot be liable. Otherwise, "a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." Also, this would make the scope of liability for negligence as great as it is for actual fraud, which would be illogical. (But, the court noted, if the members of D lacked even a genuine ***belief*** that the audit was correct, they could be found to have made a fraudulent misrepresentation, and their liability would extend to creditors, like P, who relied.) *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931).

   a. **Restatement view of *Ultramares:*** The Second Restatement accepts the result of *Ultramares*; Rest. 2d, §552, Illustr. 10. But under the Restatement, if the defendant was aware that the representation would be passed on to a ***limited number*** of people, he may be liable to one or more of those people, even if he didn't know their precise identities. For instance, if an accounting firm's client says that he will use a certified statement to negotiate "a bank loan", and does not mention a particular bank, the accountants will be liable to whatever bank is finally approached by the client and suffers loss. Rest. 2d, §552, Illustr. 7. Other instances in which the defendant may be liable to a limited class whose precise members are unknown include:

      i. **Information supplied to bidders:** Information supplied by engineers to the owner of a construction project, who passes it on to ***bidders*** on that project; if a bidder then suffers loss as a result of the information's incorrectness (e.g., by submitting too low a bid for excavation work based on an unduly favorable soil engineer's report), the engineer will be liable. See, e.g., *M. Miller Co. v. Central Contra Costa Sanitary Dist.*, 18 Cal. Rptr. 13 (1961).

      ii. **Abstractors:** Abstractors of title who furnish a ***title report*** on a piece

of property to the owner, knowing that it will be given to prospective purchasers;

iii **Public weighers:** Public weighers, who know that the certificate they give as to a commodity's weight will be relied upon by a purchaser. See,
★ e.g., *Glanzer v. Shepard,* 135 N.E. 275 (N.Y. 1922), holding that the weigher was liable to a purchaser who relied, because such reliance was known to be a likely consequence of the transaction. "Diligence was owing, not only to him who ordered [the weighing] but to him also who relied."

iv. **Surveyors:** Land surveyors who should know that their ***surveys*** will
★ be given to prospective purchasers; see, e.g., *Rozny v. Marnul,* 250 N.E.2d 656 (Ill. 1969) (relying in part on the "absolute guarantee for accuracy" contained in the survey), and also on the fact that only the very limited group of persons purchasing or lending against the lot will be injured);

v. **Lawyers:** A ***lawyer*** who drafts a will which negligently cuts out certain ***intended heirs***; see, e.g., *Lucas v. Hamm,* 364 P.2d 685 (Cal. 1961) (holding that such liability for negligence would exist in principle to beneficiaries, but deciding that the violation of the Rule against Perpetuities in question did not constitute negligence);

vi. **Public duty:** Persons having a ***public duty*** to give correct information; (e.g., a government food inspector who negligently stamps a seller's beef as "Grade A" when it is inferior, and which is then bought by the plaintiff; see Rest. 2d, §552, Illustr. 18.)

b. **Class must be limited:** But the requirement that the class be composed of a ***limited number*** of people continues to impose an important restriction on
★ liability. Thus the result of *Jaillet v. Cashman,* 139 N.E. 714 (N.Y. 1923) would be unchanged. In that case, D ran a stock ticker service, which negligently reported that the Supreme Court had decided that stock dividends were taxable income. P, a stock owner, read the news at his broker's office, and sold stock short, expecting stock prices to fall. It was held that D's relation to the public was the same as that of a publisher of a newspaper, and that D was therefore not liable to a user of its service with whom it had no contract or other direct relationship. If this situation were to arise under the Restatement Second rule, and the plaintiff were again one who did not subscribe directly to the defendant's service, the result would almost definitely be the same, because of the "limited number of persons" requirement.

D. **Contributory negligence:** The plaintiff's ***contributory negligence*** will be a defense to an action for negligent misrepresentation to the same extent that it would be a defense to any other kind of negligence action. See Rest. 2d, §552A.

E. **Damages:** The plaintiff will recover only his ***"reliance"*** damages if he proves negligent misrepresentation. (See *supra,* p. 320). Even if he has a contract with the

defendant, he will not be entitled to the "benefit of his bargain" (i.e., the difference between what the contract was really worth to him and what it would have been worth if the defendant's representations had been correct). See Rest. 2d, §552B(2).

1. **Consequential damages:** But the plaintiff may also recover ***consequential damages*** if he can prove them with appropriate certainty. For instance, if, due to the defendant's negligence, the plaintiff receives inferior goods, and resells them to a third person, the plaintiff could probably recover damages due to the fact that he loses the third person as a permanent customer.

III. STRICT LIABILITY

A. Increasing willingness to allow: Just as courts were reluctant to recognize a cause of action for negligent misrepresentation until fairly recently, so they have been even less willing to impose ***strict liability*** for "innocent" misrepresentations. But there are now at least two kinds of situations in which a substantial number (perhaps even a majority) of courts allow recovery for losses due to a misrepresentation that is neither intentional nor negligent.

B. Sale, rental or exchange: If two parties are involved in a ***sale, rental*** or ***exchange*** transaction, and one makes a material misrepresentation to the other in order to close the deal, he will be liable even if the misrepresentation was not negligent or fraudulent. Rest. 2d, §552C(1).

★ **Example:** D, a developer, induces the Ps to buy a particular house by giving them a survey which shows that the house is 20 feet from a particular boundary of the lot, as is required by local zoning laws. After Ps move in, they discover that in fact the house is less than 2 feet from that boundary, and that not only is this a violation of local zoning laws, but a trespass on their neighbor's property occurs every time anybody goes in or out of the house. *Held*, even if D's misrepresentation was completely innocent (as opposed to negligent), D is liable. *Richard v. A. Waldman & Sons, Inc.* , 232 A.2d 307 (Conn. 1967).

1. **Comparison with warranty:** In the vast majority of cases in which such a recovery based on misrepresentation made in a sale, rental or exchange is available, plaintiff could also sue on an implied or express ***warranty*** theory. But one big difference between warranty recovery and strict tort liability is that in warranty suits, a number of contract defenses, including most importantly the ***parol evidence rule***, may be asserted. In strict tort, they may not be.

   a. **Illustration:** Thus in the above example, the plaintiffs had taken title by a deed, which under the parol evidence rule dissolved any warranties which had been given in the contract of sale or orally. The court held that this did not bar the plaintiffs from suing for innocent misrepresentation.

2. **Service transactions:** A few courts have been willing to apply strict liability where the transaction between plaintiff and defendant involves a ***service*** rather than a sale, rental or exchange. For instance, if an insurance company agent told the plaintiff that the policy he was buying would cover him against a certain

kind of liability, and it didn't, the plaintiff might be able to recover in strict liability, without showing negligence on the part of the agent.

3. **Must be privity:** The sale, rental or exchange must have been directly between plaintiff and defendant. For instance, if a manufacturer makes a representation to a retailer, who passes it on to the plaintiff to induce him to buy, there will be no strict liability under Rest. 2d, §552C. See Comment d to that section.

C. **Misrepresentation by seller of chattels to consumer:** A seller of goods who makes any misrepresentation on the label, or in public advertising, will be strictly liable for any ***physical injury*** which results, even if the injured person did not buy the product from the defendant. Rest. 2d, §402B. This provision is essentially part of products liability law, and is similar to the "express warranty" provisions of the UCC. See, e.g., *Baxter v. Ford Motor Co., supra*, p. 263, which was decided on substantially the theory of §402B.

DEFAMATION

Introductory note: A person's interest in his ***reputation*** is protected by the tort actions for ***libel*** and ***slander***, collectively called ***defamation***. This area of tort law has always been somewhat irrational and confused; it is made more so by several major Supreme Court decisions which, on First Amendment grounds, have drastically limited the circumstances in which there may be a recovery, particularly where the plaintiff is a public official or other "public figure".

I. GENERAL PRINCIPLES

A. Prima facie case: To establish his prima facie case for either libel or slander, the plaintiff must prove the following elements:

1. **Defamatory statement:** A ***false*** and ***defamatory*** statement concerning him;
2. **Publication:** A communicating of that statement to a person other than the plaintiff (a ***"publication"***);
3. **Fault:** Fault, amounting at least to ***negligence***, on the part of the defendant, and in some instances, a greater degree of fault;
4. **Special harm:** Either ***"special harm"*** of a pecuniary nature, or actionability of the statement regardless of the existence of such special harm.

See generally, Rest. 2d, §558.

II. DEFAMATORY COMMUNICATION

A. Injury to reputation: To be defamatory, a statement must have a ***tendency to harm the reputation*** of the plaintiff. Rest. 2d, §559.

1. **Special activity of plaintiff:** The particular business carried on by the plaintiff may be significant in determining whether a statement about him is defamatory. For instance, it would be defamatory to say that a kosher meat dealer sells bacon; see Prosser, p. 741.
2. **Reputation not actually injured:** For the statement to be defamatory, it is not necessary that it have ***actually*** injured the plaintiff's reputation; it must simply be the case that, if it had been believed, it would have had this effect. Thus even if the defendant can show that everyone who heard the statement believed that it was false, this will not prevent the statement from being defamatory.
   a. **Special damage:** However, in most cases of slander, and in cases of libel where the defamatory meaning is not apparent from the face of the statement, the plaintiff will generally have to prove "special damage", i.e., that his reputation was ***in fact*** damaged, and that he suffered a pecuniary harm from this; see *infra*, p. 333. But this special damage requirement does

not have anything to do with whether the statement itself is defamatory; it is simply an additional requirement in certain kinds of cases.

B. Effect limited to one segment of public: Certain allegations will, if believed, diminish a person's reputation only in the eyes of ***certain segments*** of the community. It is usually held that a statement is defamatory as long as a significant and "respectable" minority of persons would draw an adverse opinion of the plaintiff from it, even if most people would not. Rest. 2d, §559, Comment e.

★ **Example:** D, a magazine, prints a piece in which P, a lawyer, is referred to as having been a "legislative representative for the Massachusetts Community Party". *Held* (in an opinion by Judge Learned Hand), the allegation is defamatory, regardless of whether "right-thinking" people would hold it against P if he were a Communist Party member or sympathizer. "It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did." *Grant v. Reader's Digest Ass'n.*, 151 F.2d 733 (2d Cir. 1945).

1. **Element of disgrace:** But there must nonetheless be an element of ***"disgrace"*** connected with the allegation. If a Democrat were called a Republican, "It is quite probable that unpleasant feelings would be aroused against him in the minds of some other Democrats; but [this statement] can scarcely be regarded as defamatory." P,W&S, p. 967, note 4.

2. **"Respectable" group:** Also, the minority who might draw an adverse opinion must be "respectable". For instance, if the plaintiff is accused of having ***informed*** to the authorities as to the activities of his former partners in crime, this would probably be held not to be defamatory, on the grounds that only criminals would draw an adverse inference; see *Mawe v. Piggott*, Ir. Rep. 4 C.L. 54 (1869).

C. Meaning to be attached to statement: Many statements can be interpreted in more than one way. Where this is the case, the statement is defamatory if ***any one*** of the interpretations is one which a reasonable man might make, and the plaintiff shows that at least one of the recipients did ***in fact*** make that interpretation.

1. **Judge-jury allocation:** It is up to the court to determine whether the statement has at least one possible, reasonable, meaning that is defamatory. If the court decides that it does, it is then up to the jury to decide whether at least one recipient took this interpretation. Rest. 2d, §614.

★ **Example:** D prints a newspaper article in which it is stated that P (the famous tort lawyer, Melvin Belli), while on an expenses-paid appearance before the Florida Bar, "took" the Bar by charging hundreds of dollars worth of clothing to his hotel bill. The trial judge rules that the statement is not defamatory, and refuses to submit the case to the jury.

Held, on appeal, it is possible that, as D alleges, the statement might be interpreted to have a non-defamatory meaning (e.g., that P was being "clever", but not dishonest). However, the statement also had a clear defamatory meaning (that P was dishonest). Therefore, the case should

have been submitted to the jury, for its finding as to whether any persons reading the article interpreted it in its defamatory sense. *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967).

a. **Recipient's belief in statement's truth not required:** However, as noted, it is not required that the recipient have ***believed*** the statement to be true, either in its defamatory sense or otherwise. Thus if, on retrial in the *Belli* case, P had produced a witness who said "I read the article, and I thought the author was accusing P of dishonesty, but I didn't believe a word she said against him", the jury could find that the statement was libellous.

2. **Meaning not apparent from face:** Many statements are defamatory on their face (such as the statement in *Belli*, *supra*). But others are defamatory only when certain ***extrinsic facts*** are known. The classic example of this is a statement in a newspaper that the plaintiff has given birth to twins; the statement is defamatory if, and only if, the recipient is aware that the plaintiff has only been married for 3 months. Where such extrinsic facts are necessary to make out the case of defamation, special common law pleading rules required the plaintiff to plead his case very carefully.

a. **Inducement:** In addition to repeating the defamatory statement, the plaintiff had to state the extrinsic facts (e.g., "Plaintiff has been married for only 3 months"). This was known as the ***"inducement"***.

b. **Innuendo:** Furthermore, plaintiff had to show in his pleading how the extrinsic facts made the statement defamatory (e.g., "Because plaintiff has been married for only 3 months, the birth announcement created a false impression that the plaintiff had been unchaste"). This was called the ***"innuendo"***.

E. **Reference to plaintiff:** The plaintiff must show that the statement was reasonably interpreted by at least one recipient as ***referring to the plaintiff***. At common law, there had to be a formal allegation in the complaint that the statement was so interpreted; this allegation was called the ***"colloquium"***.

1. **Defendant's intent irrelevant:** But the plaintiff does not necessarily have to show that the defendant ***intended*** to refer to him, rather than to someone else. Until recent constitutional decisions, in fact, there was essentially strict liability, and it was completely irrelevant whether the plaintiff was the person the defendant intended to refer to; see *infra*, p. 336.

2. **Groups:** The defendant's statement may concern a ***group***, rather than an individual. If the plaintiff is a member of this group, the statement will generally be defamatory as to him only if the group is a ***relatively small one***. Rest. 2d, §564A. It is unlikely that the plaintiff could recover if the group were larger than, say, about 25 persons. Thus a statement such as "All lawyers are shysters" would not be defamatory as to any particular lawyer (in the absence of other evidence indicating that the statement was intended to refer to the plaintiff in particular).

a. **Reference to part of class:** If the statement by its terms applies to only a

part of a class, the plaintiff's chances of recovering are even smaller. In addition to showing that the group is sufficiently small, the plaintiff probably has to show that a substantial portion of the group has been included. For instance, a statement that one person out of a group of 25 has stolen an automobile would not defame any particular member of that group; see Rest. 2d, §564A, Comment c. Probably about the most liberal (to the plaintiff) holding is that set forth in the following example.

★ **Example:** The Ds write a book in which they say that "most" of the salesmen at the Neiman-Marcus department store are "fairies". There are a total of 25 salesmen in the store. *Held*, this statement may be defamatory of each individual salesman at the store.

But a statement implying that all or most of the saleswomen at the store are prostitutes does not defame any particular one of them, since the total size of the class (382) is much too large. *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

F. Truth: A statement is not defamatory if it is ***true***. At common law, it was generally held that the ***defendant*** had the burden of proving truth.

1. **Effect of constitutional decisions:** But recent Supreme Court decisions, particularly *Gertz v. Robert Welch, Inc.*, *infra*, p. 338, require that the plaintiff prove at least that the defendant negligently failed to ascertain the statement's falsity. In order to make this showing, the plaintiff will have to show that the statement was false. Therefore, it is probably correct to say that proof of falsity is now part of the plaintiff's prima facie case, as a constitutional matter. (But in a post-*Gertz* case, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court mysteriously said that it had "carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person. . . ."

   a. **Where defendant's statement not specific:** There may be times when the defendant's allegedly defamatory statement is so vague that it would be unfair to require the plaintiff to come forward with evidence proving its falsity. For instance, if the defendant has stated that the plaintiff is a storekeeper who short changes his customers whenever he gets the chance, how can the plaintiff prove the falsity of this statement unless the defendant first comes forward with specific instances when this is supposed to have occurred? See Rest. 2d, §613, Comment j.

2. **Substantial truth:** For truth to constitute a barrier to recovery, it is not necessary that the statement be ***literally*** true in all respects. Instead, it must merely be ***"substantially"*** true. See Rest. 2d, §581A, Comment f.

   a. **Proof of different offense:** On the other hand, if the defendant has made one charge of wrongdoing against the plaintiff, he may not establish truth by proving a ***different*** charge. If the defendant has stated that the plaintiff stole a watch from A, "It is not enough to show a different offense, even though it be a more serious one, such as stealing a clock from A, or six watches from B." Prosser, p. 798.

★ **Example:** D publishes a short story by one O'Connell, in which O'Connell describes what he says were his experiences as a hospitalized soldier during World War II. The story says that P, a colonel at the hospital, was a "dictator" who "looked like a man who enjoyed seeing other men suffer", and who acquiesced in the giving of lashes, ordered wounded soldiers to go on ten mile hikes, etc. At trial, it develops that O'Connell himself never witnessed any of these events (as the story said that he had), but had merely heard stories from other soldiers. Furthermore, D's witnesses at trial do not corroborate any of the specific instances of misconduct by P, although there is evidence that P may have committed other misdeeds, and that he was convicted of "permitting cruel and unusual punishment of American soldiers."

Held, on appeal, D did not establish the "substantial truth" of the O'Connell story, and a directed verdict in P's favor should have been granted. The truth of specific charges may only be shown by evidence as to those specific offenses, and not as to other wrongdoing. *Kilian v. Doubleday & Co., Inc.*, 79 A.2d 657 (Penn. 1951).

G. Opinion: Until recently, a statement of ***opinion*** could be defamatory, and it was up to the defendant to establish that his statement fell within the common-law privilege of "fair comment".

1. **Constitutional change:** But the Supreme Court's recent constitutional decisions, particularly *Gertz v. Robert Welch, Inc.*, *infra*, p. 338, seem to mean that a ***pure expression of opinion*** (as opposed to one which implies factual matters) can never be defamatory. See Rest. 2d, §566, Comment c.

   ★ **Example:** D publishes a local newspaper. It prints a report about a city council meeting at which P, a real estate developer, attempted to get a zoning variance for certain land. Previously, P had indicated that unless he got the variance, he would not sell the city another piece it was interested in. At the meeting, this negotiating position is described by several people as "blackmail", and their statements (along with a full and fair account of the whole meeting), are reported by D. P claims that this report constitutes the charge of a crime, and is therefore defamatory.

   Held, no reader of the newspaper could reasonably believe that P had been charged with the "crime" of blackmail; the article made it clear that this word was merely used to describe what the speakers' opinions were of P's well-known bargaining position. Such pure expressions of opinion are not defamatory. *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6 (1970).

2. **Implied facts:** But if the opinion does imply undisclosed facts, and a statement of these facts would be defamatory, then the statement of opinion may be actionable. For instance, if the newspaper in *Greenbelt* simply carried a short news item stating that at the previous night's city council meeting, P had been accused of blackmail by a speaker, this would probably be held to be an opinion which, in one interpretation, contained an implicit statement that P was guilty of

an actual crime; the news report might then be considered defamatory. (However, assuming that P was a public figure, as the *Greenbelt* court held him to be, the publisher would still escape liability if it could show that it did not know of the falsity or ambiguity of the statement, and did not act in reckless disregard of these matters; see *New York Times v. Sullivan, infra*, p. 337.)

3. **Ridicule and abuse:** Statements of ***ridicule*** or ***verbal abuse*** may also fail to be defamatory because they are mere expressions of opinion. For instance, "You're an S.O.B." would not be defamatory since it obviously expresses the speaker's opinion, and does not imply any real charge about the object's ancestry.

H. Who may be defamed: Any living person may be defamed.

1. **Deceased persons:** There can be no defamation of a ***dead person***, and therefore neither his estate nor his survivors may sue. However, words spoken about a dead person may by implication defame a living one (e.g., a statement that the decedent was not married when she gave birth would defame her living child).

2. **Corporation:** A ***corporation*** may be defamed, but only if the statement "tends to prejudice it in the course of its business or to deter others from dealing with it." Rest. 2d, §561. Thus a statement that one of the officers of a corporation was an adulterer would not be held to be defamatory of the corporation, unless this were shown to hurt its business directly. This same rule applies to ***partnerships*** and ***associations***. Rest. 2d, §562.

III. LIBEL VS. SLANDER

A. Significance of distinction: The common law developed the distinct torts of libel and slander. While the problem of determining which category a particular statement fits into is a complicated one, discussed below, the significance of the distinction is fairly clear: To establish slander, the plaintiff must show that he suffered an actual "special harm" of a pecuniary nature (unless the statement falls into one of four special categories, discussed below). To prove libel, on the other hand, the plaintiff does not have to show such special harm (although some courts require him to do so if the defamatory nature of the statement is not evident on its face). Thus for a plaintiff who cannot point to any specific financial harm, and whose only complaint is that his friends have turned against him, the distinction between libel and slander remains of major importance.

B. Libel: Libel consists, first of all, of all ***written or printed matter***.

1. **Embodied in physical form:** Additionally, many modern courts, and the Second Restatement, §568, hold that it includes any communication embodied in ***"physical form"***. Thus a phonograph record or a computer tape would be libelous rather than slanderous. The Restatement in fact extends its definition of libel to include "any other form of communication that has the potentially harmful qualities characteristic of written or printed words." *Ibid.*

a. **Illustrations:** For instance, the Restatement takes the position that if the defendant hires men to "shadow" the plaintiff, and they do so until the shadowing becomes well-known throughout the community, this is libel. Rest. 2d, §568, Illustr. 1. Similarly, if the defendant places a wax figure of the plaintiff among a collection featuring various murderers, this is libel. *Ibid*, Illustr. 3.

2. **Dictation to stenographer:** A spoken statement that is intended to be written down, and is so, is libellous. Thus if a person dictates to a ***stenographer***, and the stenographer writes the statement down in shorthand, this is libel even if no one ever sees the writing. (This also probably constitutes a "publication" of the libel; see *infra*, p. 335. However, the dictation may be qualifiedly privileged; see *infra*, p. 341).

3. **Radio and television:** If a program is broadcast on ***radio or television***, all courts agree that it is a libel if the program originated with a ***written script***.

a. **No script:** But if the program is "ad-libbed", courts are in dispute. Thus in ★ *Shor v. Billingsley*, 158 N.Y.S.2d 476 (Sup. Ct. N. Y. Co. 1956), this was held to be libel, on the grounds that "the broadcast of scandalous utterances is in general as potentially harmful to the defamed person's reputation as a publication by writing."

b. **Restatement view:** The Restatement, in §568A, provides that all such broadcasting is libel, whether or not it is read from a manuscript. But statutes in a number of states provide exactly the contrary, that all broadcasts are slander. See P,W&S, p. 987, note 3.

C. Slander: All other statements are ***slander***. An ordinary oral statement is the most common form of slander.

D. Special harm: As noted, plaintiff may generally establish slander only if he can show that he has sustained some ***"special harm"***. This harm is often required to be of a ***"pecuniary nature"***. Thus where the plaintiff proved merely that the defendant's statements about him upset him so much that he became ill, this was held insufficient to constitute "special harm," since there was no evidence that other people's opinion of plaintiff was lowered. (Mere apprehension by plaintiff that this ★ would occur was insufficient). *Terwilliger v. Wands*, 17 N.Y. 54 (N.Y. 1858). Similarly, it is not enough that the plaintiff shows that his friends have rejected him, since friendship is not ordinarily something having economic or pecuniary value. See Rest. 2d, §575, Illustr. 4.

1. **Tacking on of damages:** But if the plaintiff can show the requisite pecuniary loss, he may then "tack on" his damages for emotional distress, loss of friendship, etc. This rule is similar to that which does not allow recovery for pure emotional distress in negligence actions, but permits recovery for such distress once physical injury is proved; see *supra*, p. 164.

2. **Harm caused by repetition:** In proving his special harm, the plaintiff may, in addition to showing the harm caused directly by the defendant's own statement,

point to harm caused by certain ***repetitions*** of the statement by third persons. However, this will generally only be true if the defendant authorized the repetition, or it was either reasonably to be expected or "privileged". See Rest. 2d, §576. Thus if the defendant makes a defamatory statement to one person, and makes him agree that the material will not be repeated to anyone else, harm caused when this person breaches his agreement and goes around spreading the tale probably would not count as special harm (or be recoverable as damages).

3. **Cases where no special harm necessary:** There are four kinds of utterances which, even though they are slander rather than libel, require no showing of special harm. These categories derive from a variety of historical factors, but their common element is that they are by their very nature especially likely to cause pecuniary harm. Such slander is generally called ***"slander per se"***. See Prosser, p. 754. The categories are as follows:

   a. **Crime:** Statements imputing ***criminal behavior*** to the plaintiff. However, an accusation of a minor crime (e.g., a parking ticket) is not generally enough. The Restatement requires that the conduct imputed to the plaintiff either be "punishable by imprisonment" or "regarded by public opinion as involving ***moral turpitude***". Rest. 2d, §571.

   b. **Loathsome disease:** An allegation that the plaintiff currently suffers from a ***venereal*** or other loathsome and communicable disease. The theory behind this exception is that others will be afraid of catching the disease from the plaintiff; therefore, an allegation that the plaintiff once had the disease, and is cured, will not be sufficient. Rest. 2d, §572.

   c. **Business, profession, trade or office:** An allegation that adversely reflects on the plaintiff's fitness to conduct his ***business***, trade, profession or office.

      i. **Must be relevant to office:** But the allegation must relate directly to the plaintiff's fitness to conduct these activities. Thus an allegation that a stenographer does not pay her bills, is not sufficient, since her credit-worthiness has nothing to do with whether she is a good stenographer. See Rest. 2d, §573, Illustr. 7.

      ii. **Disparagement of goods not included:** Also, if the plaintiff is a manufacturer or seller of goods, it is not sufficient that the quality of the goods themselves (as distinguished from the plaintiff's own personal reputation) is criticized. Rest. 2d, §574, Comment g.

   d. **Sexual misconduct:** Statement imputing serious ***sexual misconduct*** to the plaintiff. In general, this has been applied only to women, and has included not only adultery but also fornication. The Fourteenth Amendment may, however, be interpreted so as to require that a state give equal tort protection to men. It also seems likely that allegations of ***homosexual activity*** will be included within this category; see P,W&S, p. 933.

4. **Libel:** All courts agree that if the defamatory nature of a ***libellous*** communication is apparent from the statement itself, no special damages need be

proved. Most American courts, however, hold that where an examination of ***extrinsic facts*** must be had in order to perceive the defamation, special damages must be proved (unless the communication falls within one of the four "slander per se" categories listed above). Prosser, p. 763. Such non-self-evident libel is sometimes called ***"libel per quod"***.

a. **Restatement view:** The Restatement has taken the view that special damages need never proven for any libel, whether the defamatory nature is apparent on the communication's face or not.

IV. PUBLICATION

A. Requirement of publication generally: The plaintiff must show that the defamation was ***"published"***. "Publication" is a term of art, not meaning "disseminated by writing", but rather, ***"seen or heard by someone other than the plaintiff"***.

1. **Must be intentional or negligent:** The defendant's publication must have been either intentional or negligent. That is, there is not (and never has been) any "strict liability" as to the publication requirement. For instance, if the defendant makes a defamatory statement to the plaintiff himself, and purely by accident someone else overhears it, no publication as to that third person has occurred.

2. **Must be understood:** The plaintiff must show that the third person not only heard or saw, but also ***understood***, the communication, and perceived its defamatory aspects.

   ★ **Example:** One of D's clerks says to P, a Greek, in English, that P has stolen a handkerchief. Another clerk states the same accusation in Greek. *Held*, the first clerk's statement was not a publication, because it was addressed to (and heard by) only P. The second was not a publication because there was no evidence that any of those who heard it, other than P, understood Greek. *Economopoulos v. A. G. Pollard Co.*, 105 N.E. 896 (Mass. 1914).

3. **Dictation to stenographer:** If the defendant dictates defamatory matter to a ***stenographer*** who takes down shorthand notes of it, this is generally held to be publication, and of a libel rather than slander (even if the words are never transcribed). This is the view of Rest. 2d, §577, Comment h.

4. **Defamation by will:** If a decedent has inserted defamatory matter into his ***will***, some courts have held that the reading of the will by the executor constitutes a publication to him, and have therefore held the estate liable. See Prosser, pp. 770-1.

B. Publication by plaintiff: As noted, the making of a communication ***to the plaintiff*** is not publication. If the plaintiff then passes the statement on to someone else, this will also generally not constitute publication. But there are a few situations in which it will.

1. **Blindness:** For instance, if the plaintiff is blind, and receives a defamatory letter, there will be publication if he gives this to a friend or relative to be read to him.

2. **Job application:** Similarly, if the plaintiff is fired by the defendant, who in the course of doing so defames him, the plaintiff's repetition of this material to a new prospective employer will be a publication, at least where the employer asks "Why did you leave your last job?" See *Grist v. Upjohn Co.*, 168 N.W.2d 389 (Mich. 1969).

C. **Repeater's liability:** One who ***repeats*** a defamatory statement made by another is held to have published it, and is liable as if he were the first person to make the statement. And this is true even if he indicates that he himself does not believe the statement. See Rest. 2d, §578, Comment e.

1. **Newsdealers, libraries, etc.:** However, one who merely ***distributes*** or sells defamatory matter will not be liable if he can show he had no reason to believe the materials were defamatory; see *infra*, p. 339.

2. **Reading of written defamation:** A person who reads out loud a previously written defamation has published a ***libel***, rather than a slander. Prosser, p. 768.

D. **Single or multiple publication:** If many copies of a book are sold, is each one a separate defamation, or are they all to be treated as one defamation? The question is important for purposes of such issues as venue and statute of limitations.

1. **Single publication rule:** Most American courts now hold that an entire edition of a book or periodical is to be treated as one publication. This is called the
★ ***"single publication rule"***. Thus in *Ogden v. Ass'n of the United States Army*, 177 F.Supp. 498 (D. D. C. 1959), the plaintiff was held to have a single cause of action running from the initial publication of a book, and his claim was therefore barred by the statute of limitations.

V. INTENT

A. **Common law strict liability:** Libel and slander were, at common law, essentially ***strict liability*** torts. While the plaintiff had to show that the ***publication*** occurred due to the defendant's intent or negligence, neither intent nor negligence was required as to any of the other aspects of the tort.

1. **Falsity:** Thus it was irrelevant that the defendant had every reason to believe that the statement was ***true***. Similarly, it was irrelevant that the statement was intended to refer to A, and through no negligence on the defendant's part, was interpreted to refer to B. As the idea was expressed by one court, "The question is not so much who was aimed at as who was hit." *Corrigan v. Bobbs-Merrill Co.*, 126 N.E. 260 (N.Y. 1920).

B. **Constitutional decisions:** However, over the last decade and a half, the U.S. Supreme Court has virtually eliminated the freedom of state and federal courts to

impose strict liability for defamation. The Court's decisions have held that the plaintiff's right to recover for defamation gives way, to a certain extent, to the defendant's First Amendment free speech and free press rights.

★ 1. ***New York Times v. Sullivan:*** The Court's first major decision in this area was ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964). In that case, the plaintiff was a public official part of whose duties was the supervision of the Montgomery, Alabama police department. He alleged that the Times had libelled him by printing an advertisement that stated that the Montgomery police had attempted to terrorize Martin Luther King and his followers.

a. **Holding:** The Court held, *inter alia*, that the plaintiff was a ***"public official"***. As such, the First Amendment required that he recover only if he showed that the Times printed the advertisement either with ***knowledge that it was false*** or in ***"reckless disregard"*** of whether it was true or not. The Times had not been shown to have either of these states of mind, the court said.

i. **"Actual malice":** The Court unfortunately tried to encapsulate these two states of mind, knowledge of falsity and recklessness as to the truth, in the phrase ***"actual malice"***. But it is clear from this case and its successors that the plaintiff is not required to show malice in the sense of "ill-will" on the part of the defendant.

b. **Reference to plaintiff:** The Court in *New York Times* also noted that the advertisement in question never mentioned the plaintiff by name or by position, and that his case was based solely on the theory that the advertisement contained an "implicit" criticism of him as the person who was in control of the police. The Court implied that it might be constitutionally impermissible to allow recovery for such oblique references, even apart from the question of the defendant's state of mind.

2. **Meaning of "reckless disregard":** The Court interpreted the phrase "reckless
★ disregard of the truth" in *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Court stated that in order to make such a showing (which, under *New York Times*, any plaintiff who is a public official would have to do), it is not enough to show that a "reasonably prudent man" would not have published, or would not have published without further investigation. Rather, there must be evidence to permit the conclusion that "The defendant ***in fact entertained serious doubts*** as to the truth of his publication."

3. **Public figures:** The *New York Times* "actual knowledge or reckless disregard of the truth" test was extended to include ***"public figures"*** in *Curtis Pub. Co. v. Butts* and *Associated Press v. Walker*, both reported at 388 U.S. 130 (1967). In these cases both the University of Georgia football coach and a prominent retired Army General were held to be public figures.

4. **Private figures:** But if the plaintiff is neither a public official nor a public figure, there is ***no constitutional requirement*** that he prove knowledge of

★ truth or reckless disregard of the truth. In ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323 (1974), the plaintiff was a locally well-known lawyer who represented the family of a youth who was killed by a policeman. Plaintiff was falsely attacked as a criminal and Communist by defendant, publisher of a John Birch Society magazine. The Court, after concluding that plaintiff was a private figure,made two holdings concerning the defendant's state of mind required in actions brought by private figures: (1) The First Amendment requires that ***strict liability*** not be sufficient; in other words, the plaintiff must prove either that the defendant knew his statement was false, or that he was at least negligent in not ascertaining its falsity. (2) The states are free to decide whether they wish to establish negligence, recklessness, or intent as the standard.

a. **Who is a private figure:** *Gertz* also indicates that a person does not become a "public figure" merely because he has become involved in a controversy of public interest. The plaintiff in *Gertz* was a lawyer who brought a civil suit against a policeman accused of homicide; the Court held that he did not become a public figure merely because newspapers took a great interest in the lawsuit and surrounding events.

b. **Rejection of "public interest" rule:** Prior Supreme Court decisions had given the media the same freedom to comment upon any matter of "general public interest" as *New York Times* gave for comment about public officials. But *Gertz* repudiated these decisions. It distinguished between public officials and public figures on the one hand, and private individuals on the other, on the grounds that the former "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." Thus such private figures should not be subject to the same constitutional limitations on defamation recovery, whether they are involved in a matter of general public interest or not. (But the states are still free to impose, as a matter of state law, the requirement that such private individuals prove at least reckless disregard).

c. **Punitive damages not allowed:** The Court in *Gertz* also held that at least where the state elects to allow private figures to recover based on less than a showing of reckless disregard for truth, ***punitive damages may not be awarded.*** The question of such damages is discussed further *infra*, p. 344.

5. **Application to non-media:** Both *New York Times* and *Gertz* involved ***media*** defendants, and the Court relied heavily on freedom of the press considerations. It is not clear whether the same constitutional rules apply where the defendant is a private person or other non-media defendant. Thus it is possible that such defendants might be liable without a showing of reckless disregard or knowledge of falsity when they defame a public official or public figure, and might even be strictly liable where they defame a private figure. However, this result seems both unlikely and unfair. As the Second Restatement puts it, "Why should one be constitutionally protected if he issues a public statement about the qualifications or character of the mayor of the city, and yet not be protected if he makes the same statement in the privacy of his home to his next-door neighbor?" §580B, Comment h.

6. **Private aspects of public figures:** Even if the plaintiff is a public official or public figure, it is quite likely that some aspects of his life are so peculiarly ***private*** that the defendant's statement as to these aspects will not be protected by the *New York Times* "reckless disregard" requirement. See Rest. 2d, §580B. This would probably be true, for instance, of a politician's sex life, as long as it did not amount to "misconduct" reflecting on his fitness for office.

7. **Liability of newsdealers, libraries, and other "secondary publishers":** Prior to *New York Times*, newsdealers, libraries, book stores, etc., were held liable for defamation only if it could be shown that they had reason to know that the publications they handled contained defamatory matter; these defendants were often called ***"secondary publishers"***. This distinction was significant, since "primary" publishers (including publishers and broadcasters) were held strictly liable, even if they merely passed on statements made by someone else.

   a. **Decreasing importance:** But since, as a result of *Gertz*, strict liability is no longer permitted, even against primary publishers, this distinction seems likely to become of little importance. It may, however, be used to keep a secondary publisher from being deemed negligent if he merely fails to inspect his material, whereas a primary publisher might be liable for such a failure.

VI. PRIVILEGES

A. Privileges generally: Even if the plaintiff succeeds in surmounting all of the hurdles discussed thus far, he may still lose because the defendant establishes that he had a ***privilege*** to make the defamatory statement. Privileges are divided into "absolute" ones and "conditional" ones.

1. **Distinction:** The distinction between these two classes is that an "absolute" privilege applies regardless of whether the defendant was activated solely by malice or other bad motives, whereas a "conditional" privilege applies only where the defendant acts for certain well-defined purposes.

B. Absolute privileges: The following classes of absolute privileges are usually recognized:

1. **Judicial proceedings:** Judges, lawyers, parties, and witnesses are all absolutely privileged in what they say during the course of ***judicial proceedings***, regardless of the motives for their statements. For instance, even if a judge tells the jury, for purely personal and malicious reasons, that the defendant should be convicted because he is a born crook and liar, the defendant cannot win a slander suit.

   a. **Must be relevant to proceeding:** The one limitation on this privilege, however, is that the defendant's statement must have ***"some relation"*** to the matter at issue. See Rest. 2d, §§ 585-589.

   ★ **Example:** P is a prosecution witness at a murder trial. In order to impeach her credibility, the defendant's attorney, D, tells the jury that P is a "dope

fiend". In a defamation action by P against D, *held*, D's comments were absolutely privileged, as long as those comments were not "wholly foreign" to the issues. Since P's credibility was at issue in the trial, and since her alleged drug use was arguably relevant to her credibility, D's comments were privileged. It doesn't matter that the comments were "extremely harsh and unjust", or even that they may have been motivated by malice.

(The court also held that a live radio broadcast of the proceedings was to be treated the same as the proceedings themselves, and that therefore the trial judge who allowed the broadcast, and the broadcaster, were not liable.) *Irwin v. Ashurst*, 74 P.2d 1127 (Ore. 1938).

2. **Legislative proceedings:** A similar privilege exists for ***legislators*** acting in furtherance of their legislative functions (e.g., making a speech on the floor), and witnesses before legislative proceedings. Rest. 2d, §§ 590-590A.

   a. **Hearings:** The privilege extends to ***legislative hearings.*** But it does not extend to a "newsletter" published by a legislator, and probably not to press conferences held by him, although these may be protected by the "Speech or Debate" clause of the Constitution. See Rest. 2d, §590, Comments a and b.

3. **Government officials:** Certain government officials may also have an absolute immunity from defamation, as to statements issued in the course their jobs.

   a. **Federal officials:** The Supreme Court has held ***all federal officials***, no matter how low their rank, have this absolute privilege. *Barr v. Matteo*, 360 U.S. 564 (1959).

   b. **State officials:** All states agree that the governor, and other high state officials, have a similar immunity. But states disagree about whether this ★ absolute immunity extends down to the lower ranks. See, e.g., *Carr v. Watkins*, 177 A.2d 841 (Md. 1962), holding that in Maryland, county policemen do not have such an absolute immunity, but merely a conditional one (which is lost if the action is taken for malicious reasons, even if during the scope of official duties.)

   c. **Must be within course of duty:** Even where the absolute immunity exists, it applies only if the defamatory statement occurs in the course of, and in ★ furtherance of, the defendant's job. For instance, in *Carr v. Watkins, supra*, the court held that an employee of the federal Naval Ordinance Laboratory may not have been acting within his duties when he told the plaintiff's boss that the plaintiff (a former co-worker) had been charged six years before with molesting a minor and been fired. Since the defendant was a security officer at the Laboratory, the question for the jury was whether the Laboratory's security would have been increased by getting the plaintiff fired from his new job as a shopping center guard. (The court implied that it would not be.)

4. **Husband and wife:** Any communication between a ***husband and wife*** is absolutely privileged. Rest. 2d, §592.

   a. **May count as publication:** But if a defamation originates with a third

person, and is relayed by a husband to his wife, this repetition will still be a publication, and the third person will be liable for the harm caused by it. This is so under the rule that one who publishes a defamation is liable for any damage caused by the privileged repetition of it; see Rest. 2d, §576(a).

5. **Consent:** Any publication that occurs with the ***consent*** of the plaintiff is absolutely privileged. This is true even if the plaintiff has attempted, for the purposes of establishing a defamation suit, to maneuver the defendant into repeating a previously privileged statement. For instance, if the defendant has defamed the plaintiff during the course of a trial, and the plaintiff says to him, "Step outside the courtroom and repeat that, so I can sue you", the repetition will be privileged. Prosser, p. 784.

   a. **Attempt to find out what is said:** But if the plaintiff has merely attempted to find out what the defendant is saying about him, and asks him to repeat it for this purpose, this is not held to be consent to the previous defamation. Prosser, pp. 784-5.

C. **Qualified privilege:** In addition to these absolute privileges, there are a number of ***"conditional"***, or ***"qualified"*** privileges. The distinction between them and the absolute privileges is that the conditional ones will be lost if the defendant is acting primarily from ***malice***, or for some other purpose not protected by the privilege.

1. **Protection of publisher's interest:** The defendant is conditionally privileged to ***protect his own interests***, if these interests are determined to be sufficiently important, and the defamation is directly enough related to those interests. Rest. 2d, §594. Some of the interests which are generally held to be of sufficient importance include the following:

   a. **Protection of property:** Protection of the defendant's ***property***. Thus if the defendant's property has been stolen (or he reasonably believes that it has been) he may tell his suspicions of the plaintiff to the police. (But he may be held to have ***abused*** this privilege, by acting recklessly, or by spreading the defamation more widely than necessary; see *infra*, p. 343).

   b. **Protection against defamation of defendant:** The plaintiff may be conditionally privileged to protect ***himself*** against defamation by the plaintiff. For instance, he may have a qualified privilege to call the plaintiff a liar, even if he isn't.

   c. **Competition not sufficient interest:** But a businessman's attempt to obtain a ***competitive advantage*** is not a sufficient interest to qualify for the conditional privilege. Thus a businessman has no right to say that one of his competitors does shoddy work, merely in order to gain a customer for himself (although, of course, he will not be liable if he can show the truth of this statement).

2. **Interest of others:** Similarly, the defendant may be qualifiedly privileged to act for the protection of the ***recipient*** of his statement, or some other third person. But the Restatement limits this privilege to situations where the recipient is "a person to whom [the statement's] publication is . . . within the generally accepted

standards of ***decent conduct***." Rest. 2d, §595(1)(b).

a. **Definition of "decent conduct":** In determining what is within these standards of "decent conduct", the Restatement attaches considerable importance to the fact that the statement is made "in response to a ***request*** rather than volunteered by" the defendant. *Ibid*, §595(2)(a).

b. **Family or other relationship:** Another factor tending to make the statement "decent conduct" is that there is a family or other ***relationship*** between the defendant and the person to whom he makes the statement. For instance, where an official of a company connected with the plaintiff's ex-employer warned the plaintiff's new boss that the plaintiff might be dishonest, this was held to be conditionally privileged; the court relied on the fact that the official and the new employer, even though competitors, had a
★ "close personal and business relationship". *Sindorf v. Jacron Sales Co., Inc.*, 341 A.2d 856 (Ct. Sup. App. Md. 1975). (But the court also held that a jury could reasonably find that the conditional privilege had been abused; this aspect of the case is discussed *infra*, p. 344).

i. **Restatement view:** The Restatement recognizes that an employer will generally have such a conditional privilege to give information about his ex-employee to a new boss; see Rest. 2d, §595, Comment i.

c. **Credit-reporting agencies:** A number of states have held that ***credit-reporting agencies*** have a conditional privilege to give their subscribers credit-worthiness reports on potential customers. See Rest. 2d, §595, Comment h. But again, this privilege may be abused, as it almost certainly would be by recklessness, and perhaps even by negligence.

3. **Common interest:** The defendant may have a conditional privilege because of the fact that he and the recipient have a ***common interest***. Rest. 2d, §596. For instance, one member of a club might be conditionally privileged to tell his co-members that a proposed applicant should not be admitted because he is a thief.

4. **Where recipient can act in public interest:** There may be a conditional privilege where a communication is made to one who has the power to ***act in the public interest*** (usually a public official). Rest. 2d, §598. For instance, a private citizen's accusation about crime made to a policeman or district attorney would have this privilege.

a. **Abuse:** But like all other conditional privileges, this one may be abused. Thus where the defendant, an employee of the New York Civic League, wrote a letter to a district attorney accusing the plaintiff of "keeping girls for immoral purposes", it was held that the defendant's own source of information was so vague and uncorroborated that a jury could find the defendant guilty of recklessness; in that case, the privilege would be lost.
★ *Pecue v. West*, 135 N.E. 515 (N.Y. 1922).

5. **Report of public proceedings:** At common law, there was a conditional privilege to report on ***public proceedings***, such as court cases, legislative

hearings, etc. To the extent that such reports concern "public officials" or "public figures", the privilege is no longer needed, since as long as there is no knowledge of falsity or reckless disregard of the truth, there can be no liability under *New York Times*, even if the report is erroneous.

a. **Private figure:** But if the plaintiff is a private figure, the privilege may still have some significance. In general, this would be so only where a state decides that the privilege should be deemed to be abused only where recklessness (as opposed to negligence) on the part of the defendant is shown. See *infra*, this page.

b. **Report of pleadings:** The privilege has generally been held not to apply to reports of ***pleadings*** filed in court which have not yet been acted upon. See P,W&S, p. 1051, note 4.

D. Abuse: Even where a conditional privilege exists, it may be ***abused*** (and therefore forfeited) in a number of different ways.

1. **Knowledge of falsity or reckless disregard:** The privilege will be lost if the defendant ***knew that his statement was false***, or acted in ***reckless disregard*** of whether it was true or not.

a. **Rejection of negligence standard:** Prior to *Gertz v. Robert Welch, supra*, many courts held that a privilege was abused if the defendant was merely ***negligent*** in not ascertaining the falsity of his statement. But since, under *Gertz*, negligence is required in all cases, as part of the plaintiff's prima facie case, it would not be sensible to hold that a conditional privilege is lost through negligence; this would mean, in any case in which less than reckless disregard was shown, that the privilege was abused as soon as the necessity for it (i.e., the establishment by the plaintiff of his prima facie case) was shown. See Rest. 2d, Ch. 25, "Special Note on Conditional Privileges and the Constitutional Requirement of Fault".

i. **Negligence sufficient for prima facie liability:** But observe that a court might still hold that a publisher or other person who speaks negligently and falsely is liable, without regard to the issue of privilege.

★ For instance, in *Gobin v. Globe Pub. Co.*, 531 P.2d 76 (Kan. 1975), D was a newspaper which had published a story falsely stating that P had pleaded guilty to a cruelty-to-animals charge. The Court, without referring to the traditional "privilege" of reporting on public proceedings, held that D could be found liable if it had been merely negligent in its error. The Court saw "little or no societal interest in protecting carelessness in reporting judicial proceedings at the expense of truth in matters potentially defamatory on their face." Thus the defendant in *Gobin* did not have a privilege which it lost through abuse; it was simply liable for negligent misreporting.

b. **Publication of rumor:** Even if the defendant knows or believes that the defamatory matter is not true, he will not abuse a conditional privilege if he states that the matter is ***rumor or suspicion***, and publication of the

statement is otherwise reasonable. For instance, if D tells his friend X that he has heard a rumor that P, X's employee, is dishonest, this would not constitute an abuse of the conditional privilege to protect X's interest. See Rest. 2d, §602, Illustr. 1.

2. **Purpose of the privilege:** A conditional privilege will also be lost if the ***primary purpose*** behind the defendant's statement is something other than protecting the interest for which the privilege is given. For instance, where a person connected with the plaintiff's ex-employer made allegations to the plaintiff's new boss concerning his honesty, it was held that a jury could find that this communication was simply an attempt to coerce the plaintiff into returning certain materials to the defendant, or to find out whether the plaintiff had started work for the new boss before quitting the old job; in either event, this
★ would be an abuse of the privilege of protecting the new boss's interests. *Sindorf v. Jacron Sales Co., Inc.*, 341 A.2d 856 (Ct. Sp. App. Md. 1975).

3. **Excessive publication:** The privilege is abused if the statement is made to persons to whom publication is ***not reasonably necessary*** to protect the interest in question. Rest. 2d, §604. Similarly, if more damaging information is stated than is reasonably necessary for the purpose, the privilege is abused. For instance, if the defendant reported to a policeman his suspicions that the plaintiff had committed a theft, and added his belief that the plaintiff was a homosexual, this would probably constitute an abuse. See Rest. 2d, §§ 605 and 605A.

VII. REMEDIES

A. Damages: A successful defamation plaintiff may, of course, recover ***compensatory*** damages. These can include not only items of ***pecuniary*** loss (e.g., lost business), but also compensation for humiliation, lost friendship, illness, etc., even though these items would not count as ***"special harm"*** for purposes of slander (see *supra*, p. 333).

1. **Punitive damages:** In *Gertz v. Robert Welch, supra*, the Supreme Court held that ***punitive damages*** may not be awarded upon less than a showing that the defendant knew his statements were false or recklessly disregarded the truth. Thus in those states that allow recovery by a private figure upon a mere showing of negligence, punitive damages are not allowable. Where such recklessness or knowledge of falsity is proved, it seems probable that punitive damages are constitutionally allowable, although even this may turn out not to be so where considerations of free speech and freedom of the press are particularly important.

2. **Nominal damages:** Even a plaintiff who has suffered no direct loss will, in order to "clear his name", often have a powerful incentive to try to establish defamation, and recover nominal damages. *Gertz, supra*, held that the plaintiff may only recover ***"actual"*** damages (i.e., compensatory ones) if he does not establish at least reckless disregard of the truth. This holding may mean that nominal damages are never awardable upon a mere showing of negligence; P,W&S, p. 1054 argue that such a result would be undesirable.

B. Retraction: Almost two-thirds of the states, in order to discourage defamation suits, have enacted so-called ***"retraction"*** statutes. Some of these statutes hold that if the defendant publishes a retraction of a defamatory statement within a certain period of time, this bars recovery. Others merely require a news medium to grant a right of response to the plaintiff, without providing that this eliminates the defamation action. See P,W&S, pp. 1054-55.

MISCELLANEOUS TORTS: INVASION OF PRIVACY; MISUSE OF LEGAL PROCEDURES; INTERFERENCE WITH ADVANTAGEOUS RELATIONS; FAMILIAL AND POLITICAL RELATIONS

I. INVASION OF PRIVACY

A. Right generally: The so-called "invasion of privacy" cause of action is essentially four distinct mini-torts. They have in common not much more than the fact that they involve various aspects of the plaintiff's "right to be let alone".

B. Appropriation: The plaintiff can sue if his ***name or picture*** has been ***appropriated*** by the defendant for his own financial benefit.

★ **Example:** D1, a baker, runs an advertisement for his bread in D2's newspaper. The ad states, "Keep that Slyph-Life Figure by eating more of Melts' rye and whole wheat bread, says Mlle. Sally Payne, exotic red-haired Venus." By mistake, the ad contains a picture of P in a bathing suit rather than a picture of Sally Payne. *Held*, "The unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action. . . ." Furthermore, P is entitled to nominal damages if she cannot prove actual damages. *Flake v. Greensboro News Co.*, 195 S.E. 55 (N.C. 1938).

1. Statutory regulation: A number of states have enacted statutes preventing such appropriation. The best-known of these is New York Civil Rights Law §§ 50-51, which prohibits the use of any person's name or likeness without his consent for "advertising purposes" or for "purposes of trade".

C. Intrusion: The plaintiff may sue if his ***solitude*** is ***intruded upon***, and this intrusion would be "highly offensive to a reasonable person." Rest. 2d, §652B.

Example: D is defending a libel suit brought by her ex-husband, X; X claims that D slandered him by stating that he had had a homosexual affair with P. To establish the defense of truth, D wants to match hair she has found in X's bed with P's own hair. In order to do so, she has a friend obtain from a hospital room used by P samples of P's hair from a hairbrush and a discarded adhesive bandage. P sues D for intrusion on his privacy.

Held, P has a cause of action for invasion of privacy. Furthermore, the taking of the hair samples is not privileged, even though use of these samples in a court proceeding would be privileged as against a defamation claim. *Froelich v. Adair*, 516 P.2d 993 (Kan. 1973).

A dissent contended that the intrusion in this case, the taking of hair samples from a hair brush and bandage, was not one which would be "highly offensive to a reasonable person". According to the dissent, the

offensiveness should be measured not by the potential impact of the charges which D sought to prove, but by the intrusion itself, which was not particularly shocking.

1. **Must be private place:** This "intrusion upon seclusion" branch of invasion of privacy is triggered only where a ***private place*** is invaded. Thus if the defendant takes the plaintiff's picture in a public place, this will normally not be enough. (However, if a picture were taken of a private portion of the plaintiff's person, such as her underwear when exposed by a fan in a "fun house", this may be actionable; see Rest. 2d, §652B, Illustr. 7).

D. Publicity of private life: The publicizing of details of the plaintiff's ***private life*** may be an invasion of his privacy. As in the case of "invasion of seclusion", the effect must be "highly offensive to a reasonable person". Rest. 2d, §652D.

Example: D, a frustrated creditor of P, puts up a notice in the window of his store stating that P owes him money and has not paid him. This is an invasion of P's privacy. Rest. 2d, §652D, Illustr. 2.

1. **Must be truly "private":** The details divulged must be truly "private" ones, which are not contained anywhere on the public record. This requirement is ★ spelled out, as a constitutional principle, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In that case, the defendant broadcasting company broadcast the name of a deceased rape victim, in violation of a state law. The Supreme Court held that the girl's parents could not constitutionally be given recovery for invasion of privacy. The Court relied on the fact that the name of the victim was given in indictments made available for public inspection at the rapists' trial, and held that the First Amendment required that dissemination of such publicly available information not be prohibited.

2. **Tort in constitutional jeopardy:** *Cox* leaves open the question of whether it is constitutional to allow a tort recovery for the publicizing of truthful matter that is ***not*** contained on any public record. It is possible that the Court will ultimately decide that so long as the publicized facts are accurate, it is a violation of the First Amendment to allow tort recovery.

   a. **Must not be of legitimate public concern:** The Second Restatement requires that the material be "not of legitimate concern to the public". Rest. 2d, §652D(b). For instance, the Restatement suggests that if the plaintiff is tried for murder and acquitted, it is not an invasion of his privacy for newspapers to give reports on his past history and daily life, even if the reports are printed after the trial has ended. Rest. 2d, §652D, Illustr. 13.

3. **Must be publicized:** The private details must be ***publicized***, as opposed being released to a few people. For instance, if a creditor notifies his debtor's employer about the debt and the debtor's refusal to pay it, this is not invasion of privacy. Rest. 2d, §652D, Illustr. 1.

E. False light: The plaintiff can sue if he is placed before the public eye in a ***false light***, and this false light would be highly offensive to a reasonable person. Rest. 2d, §652E.

Example: P is a war hero. D makes a movie about P's life, which contains much material concerning a fictitious private life of P, including a non-existent romance with a girl. D is liable for invasion of privacy. Rest. 2d, §652E, Illustr. 5.

1. **Constitutional limits:** In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Supreme Court held that such a "false light" action could only be brought if the plaintiff could show that the defendant knew it was portraying its subject in a false light, or acted in reckless disregard of this issue. (The Court was consciously applying the defamation standard defined in *New York Times v. Sullivan, supra*, p. 337).

   a. **Possible relaxed standard for private figures:** However, just as *Gertz v. Robert Welch, supra*, p. 338, cut back on the *New York Times* requirement by allowing mere negligence to suffice when a defamation suit is brought by a private figure, so *Time v. Hill* may ultimately be interpreted to allow a "false light" recovery on a showing of mere negligence where the plaintiff is a private figure.

      i. **Issue skirted:** The Supreme Court declined to address this question in ★ *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). In that case, the defendant newspaper published an article about the plight of a family whose head had been killed in the collapse of a bridge. The article falsely implied that the mother of the family had been interviewed, and also falsely portrayed the family as living in a dirty and dilapidated home. The Court held that the jury could reasonably have concluded that the author of the story knew that he was misrepresenting these aspects, and that his state of mind could be imputed to the defendant under the rules of *respondeat superior*. Therefore, the Court concluded, the jury could properly have found "actual malice" as that term was used in *New York Times v. Sullivan* (despite the fact that there may not have been any "ill will," necessary for punitive damages, which were denied by the judge).

2. **Distinguished from defamation:** In many "false light" cases, the material will also be defamatory of the plaintiff. But this is not necessarily the case. For instance, in the example of the war hero given *supra*, P can sue for invasion of privacy even though the movie does not hold him up to ridicule (and even portrays his private life in a manner which some people would find dashing and romantic). However, the presentation must be "highly offensive to a reasonable person", and trivial deviations from the literal truth will not be enough. Rest. 2d, §652E, Comment c.

F. Constitutional right of privacy: In addition to these four well-defined common law branches of invasion of privacy, a number of courts have recognized a more amorphous "constitutional" right of privacy, which if violated may give rise to a right of action. For instance, where the plaintiff, a female assault victim, was ordered by police to strip and allow photographs of her body to be taken, which were then circulated throughout the police department, she was held to have a tort claim

★ against the police arising out of her constitutional right of privacy. *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

G. Privileges: Most courts, and the Second Restatement, hold that the absolute and conditional ***privileges*** allowable in defamation actions are also available in invasion of privacy actions. Rest. 2d §§ 652F and 652G.

1. **Consent:** For instance, if the plaintiff consents to an appropriation of his name, publication of private information about him, etc., this consent will be a defense (assuming that its scope is not exceeded). Rest. 2d, §652F, Comment b.

II. MISUSE OF LEGAL PROCEDURE

A. Three torts: Three related tort actions protect the plaintiff's interest in not being subjected to unwarranted judicial proceedings. These are:

1. ***malicious prosecution;***
2. ***wrongful institution of civil proceedings;*** and
3. ***abuse of process.***

B. Malicious prosecution: To make out a prima facie case of malicious prosecution, the plaintiff must prove the following elements: (1) That the defendant instituted ***criminal proceedings*** against him; (2) That these proceedings terminated ***in favor of the plaintiff*** (the accused); (3) That the defendant had ***no probable cause*** to institute the proceedings; and (4) That the defendant was motivated primarily by some purpose other than bringing an offender to justice. See Rest. 2d, §653; Prosser, p. 835.

1. **Initiating proceeding:** The plaintiff must show that the defendant took an ***active part*** in instigating and encouraging the prosecution. For instance, if the defendant merely states what he believes to be the facts to the prosecutor, and leaves to the latter the decision whether to prosecute, this will probably not be "institution" of proceedings. But if the defendant has attempted to influence a district attorney to prosecute, or has lied so as to make prosecution more probable, this will be sufficient. See Prosser, pp. 836-7.

   a. **Prosecutorial immunity:** The prosecutor himself is absolutely immune from malicious prosecution suits, even if he is shown to have acted in bad faith. Prosser, p. 837. This immunity is also generally given to police officers, as long as they act within the general scope of their duties. Prosser, pp. 837-8.

2. **Favorable outcome:** The criminal proceedings must ***terminate in favor of the accused*** (the plaintiff). This requirement is met not only where there is an acquittal, but also where the prosecutor ultimately decides not to prosecute because he does not think he has a good case, or a grand jury refuses to indict, or any other disposition that indicates the weakness of the case.

a. **Plea bargain:** But a ***plea bargain***, in which the plaintiff pleads guilty to some other offense, will not meet the "favorable disposition" requirement. Rest. 2d, §660(a).

3. **Absence of probable cause:** The plaintiff's biggest hurdle is likely to be the requirement that he show that the defendant ***lacked probable cause*** to institute the proceedings. In general, the defendant will be held to have had probable cause if he correctly or reasonably believed that the plaintiff had committed certain acts, and that these acts constitute the crime charged. Rest. 2d, §662.

   a. **Mistake:** The defendant may have been mistaken either as to the facts (i.e., whether the plaintiff committed the acts in question) or as to the law (i.e., whether those acts constitute the crime charged). But as long as his mistake is ***reasonable***, he does not lack probable cause.

      i. **Mistake of law:** But a layman's erroneous belief that certain conduct constitutes a crime is quite likely to be held to be unreasonable, if it is not arrived at after consultation with a lawyer or prosecutor. Once the defendant ***does*** receive assurances of his lawyer or the prosecutor that these facts constitute a crime, however, he has probable cause (assuming that he has made full disclosure of the facts known to him). See Rest. 2d, §662, Comment i and §666.

   b. **Effect of outcome:** The outcome of the criminal proceeding may, but does not necessarily, effect the existence of probable cause. If the plaintiff was convicted, this will always mean that the defendant had probable cause. If the complaint is dismissed by a magistrate, or a grand jury refuses to indict, most courts hold that this conclusively establishes lack of probable cause. Prosser, p. 845.

      i. **Acquittal:** But an ***acquittal*** of the plaintiff does not establish lack of probable cause, and is not even admissible as evidence to that effect. The obvious reason for this is that the plaintiff can obtain an acquittal merely by showing a reasonable doubt, yet the existence of such a doubt is not incompatible with the existence of probable cause. See Rest. 2d, §667(2).

      ii. **Retrial in tort action:** The consequence of this is that even if the plaintiff has been acquitted, the defendant has a right to ***retry the plaintiff's guilt*** in the course of the tort action. If he can show, by a preponderance of the evidence, that the plaintiff was guilty of the crime
      ★ charged, he has established probable cause. See *Shoemaker v. Selnes*, 349 P.2d 473 (Ore. 1960), in which the defendant was able to make such a showing.

4. **Improper purpose:** Lastly, the plaintiff must show that the defendant acted out of ***malice***, or for some other purpose than bringing an offender to justice. For instance, if the crime charged is the obtaining of money by false pretences, the plaintiff might meet the "improper purpose" requirement by showing that the

defendant was his creditor, and was trying to coerce him into paying the debt. See Rest. 2d, §668, Comment g.

5. **Damages:** It is usually held that the plaintiff does not have to prove actual pecuniary loss. But the common law principle of allowing "presumed damages" for harm to reputation, in the absence of an actual showing of such harm, is probably unconstitutional in light of *Gertz v. Robert Welch, supra*, p. 338. To the extent that plaintiff can prove such actual harm to his reputation, emotional distress, lost income, etc., stemming from the proceedings, he may recover for these losses.

C. **Wrongful civil proceedings:** The tort of "malicious prosecution", as noted, formally relates only to unwarranted ***criminal*** proceedings. Most states, however, have granted a similar tort action for wrongful institution of ***civil*** proceedings. See, e.g., ★ *Peerson v. Ashcraft Cotton Mills*, 78 So. 204 (Ala. 1917). While this tort is also often called "malicious prosecution", the better term is "wrongful use of civil proceedings" (the Restatement's term) or something like it.

1. **Elements:** In general, the plaintiff must prove the same elements as for the criminal proceedings case.

2. **Institution of proceedings:** The "civil proceedings" which the defendant has initiated can include not only the ordinary civil lawsuit, but also insanity or bankruptcy proceedings, administrative proceedings, ancillary attachment proceedings, etc.

3. **Probable cause:** The defendant must be shown to have acted without probable cause.

   a. **Easier standard:** However, one has probable cause to institute civil proceedings on a significantly less certain knowledge of the facts than would suffice for a criminal proceeding (because of the difference in the burden of proof ultimately imposed, as well as the usually less severe hardship imposed on the person defending the action).

   b. **Mistake of law:** Similarly, the institutor of civil proceedings is less harshly penalized for a mistake of law than one who starts criminal proceedings; it is enough if he reasonably (though mistakenly) believes that there is a ***respectable chance*** (even if less than 50%) that he will be able to convince a court or a jury of the legal merits of his claim. Rest. 2d, §675, Comment e.

4. **Improper purpose:** The civil proceedings must have been instituted for an ***improper purpose***. The only proper purpose for such proceedings is "securing the proper adjudication of the claim on which they are based". Rest. 2d, §676. Thus if the suit is a "nuisance" suit or "strike suit", which the plaintiff knows has no real chance of succeeding, and which is brought solely for the purpose of extorting a settlement, this is an improper purpose. The same would be true of a ***counterclaim*** asserted solely for the purpose of delaying proceedings. Rest. 2d, §676, Comment c.

5. **Favorable termination:** The civil proceedings must have terminated in favor of the person against whom they were brought.

a. **No re-litigation:** This first adjudication cannot be relitigated on the merits, as it could in the case of a criminal acquittal. That is, it is not open to the person defending the "wrongful civil proceedings" claim to show that he should have won on the merits at the first trial, and is therefore not liable. (But he may, of course, show that he had probable cause to start the suit.)

D. **Abuse of process:** Even if a criminal or civil proceeding is brought with probable cause, and for allowable motives, a person involved in it may use various litigation devices available to him during the course of it for improper purposes. If so, he will be liable for ***"abuse of process"***.

1. **Writ of arrest:** Thus in one case a judgment creditor, in order to avoid the trouble of having the sheriff seize the debtor's property and sell it off to satisfy the judgment, improperly obtained an arrest warrant. (At the time, a debtor could be imprisoned until he paid the debt.) As the creditor hoped, this arrest coerced the debtor into paying the judgment directly. The court allowed a cause of action for abuse of process, even though the underlying suit (which gave rise to the
★ judgment) had not been terminated in the debtor's favor. *Ash v. Cohn*, 194 A. 174 (N.J. 1937).

2. **Subpoena:** Similarly, the use of a ***subpoena*** against a person to harrass him or make him settle a suit, rather than for the proper purpose of obtaining his testimony, would be an abuse of process. See Rest. 2d, §682, Illustr. 3.

III. INTERFERENCE WITH ADVANTAGEOUS RELATIONS

A. **Three business torts:** A cluster of three tort actions protects certain business interests that are not protected by any of the actions previously discussed. These three are commonly referred to as:

1. ***injurious falsehood;***
2. ***interference with contract;*** and
3. ***interference with prospective advantage.***

B. **Injurious falsehood:** The tort action for ***"injurious falsehood"*** protects the plaintiff against certain false statements made against his business, product, or property. The action is most often helpful to a businessman whose competitor has made false statements disparaging the plaintiff's ***goods or business***. In such a case, the tort is often called ***"trade libel"***. The plaintiff must generally prove the following elements:

1. **False disparagement:** First, he must show that the defendant made a false statement disparaging the plaintiff's goods, business, etc.

a. **Falsity:** The plaintiff bears the burden of proving the statement's falsity.

b. **Not co-extensive with defamation:** A statement can disparage the plaintiff's business or product even though it is not defamatory as against the plaintiff. For instance, if the defendant tries to get people to buy from

him rather than from the plaintiff by saying that the plaintiff is dead or out of business, this is disparagement, even though it's not defamatory of the plaintiff (since it does not hold the plaintiff up to ridicule or disgrace).

★ **Example:** D and P offer a similar service, that of testing the honesty of businesses' employees. D falsely tells Life Magazine that his own business is "unique" and "the only company of its kind". *Held*, this has disparaged P's business, by implying either that there is no such business or that it is not of the same kind as D's. Also, P is not required to point to actual lost sales in proving pecuniary harm; a showing of "general loss of business" is sufficient. (This is in accord with the modern, liberal, view on pecuniary harm; see *infra*, this page). *Dale System v. Time, Inc.*, 116 F.Supp. 527 (D. Conn. 1953).

2. **Publication:** Plaintiff must show that the statement was "published", as that word is used in defamation cases.

3. **Intent:** The plaintiff must also show ***scienter*** on the part of the defendant. Unlike common law defamation, for which the defendant could be liable if he either innocently or negligently failed to ascertain the falsity of his statement, the trade libel defendant must have either: (1) known his statement was false; (2) acted in reckless disregard of whether it was false; or (3) (according to some courts) acted out of ill-will or spite for the plaintiff, or to interfere with the plaintiff's business in some impermissible way. See Rest. 2d, §623A and Caveat thereto.

★ **Example:** The same facts as *Dale System, supra*, except that suit is brought against a radio station for broadcasting the statement that the other business is the only one of its kind. *Held*, the complaint alleges at most that the defendant radio station was negligent in not ascertaining the falsity of the statement, and therefore fails to state a cause of action. *Dale System v. General Teleradio*, 105 F.Supp. 745 (S.D.N.Y. 1952).

4. **Special damages:** The plaintiff must prove ***"special damages"***. This "special harm" is defined the same way as in defamation; i.e., the harm must be
★ "pecuniary". Thus in *Dickes v. Fenne*, 82 Eng. Rep. 411 (K.B. 1639), D said of P, a brewer, that D's horse could "pisse as good beare as [P] doth Brew." Recovery was denied on the grounds that no pecuniary damage was shown.

   a. **General lost business:** Courts used to hold that it was not enough for the plaintiff to show that his business suffered generally, and required him to point out specific lost sales. However, the modern view seems to be that this requirement will not be imposed where it is unreasonable to do so. For instance, if the disparagement is widely circulated, the plaintiff may be permitted to recover for the general reduction in the volume of his business, if he can show that there is no other reasonable explanation for this drop apart from the defendant's statement; see Prosser, p. 923-4.

5. **Defenses:** The defendant can raise a number of defenses, some of which are as follows:

a. **Truth:** The defendant can, of course, attempt to show that the statement was true. As noted, it is generally up to the plaintiff to show that the statement is false.

b. **Privileges:** Any of the absolute and conditional privileges that could be raised in a defamation case (*supra*, p. 339), may be raised by a trade libel defendant.

c. **Competition:** Furthermore, courts recognize a privilege that does not exist in the defamation context, that of ***pursuing competition by fair means.***

i. **General comparisons:** In particular, the defendant is privileged to make ***general comparisons*** between his product and the plaintiff's, stating or implying that his product is the better one. But this privilege only extends to statements that are, in the language of misrepresentation, "puffing"; see *supra*, p. 316. If the defendant makes ***specific*** false allegations against the plaintiff's product, he will not be protected.

★ **Example:** P and D both make devices for testing industrial material. D sends to P's present and prospective customers a false report that the U.S. government has found P's product to be only about 40% as effective as D's. *Held*, this statement goes beyond the bounds of privileged "unfavorable comparison". A statement that another's product is only "40% as effective" as one's own is already too specific to qualify for this privilege; the matter is even worse when a false allegation is made that this conclusion has been reached by the U.S. government. *Testing Systems, Inc. v. Magnaflux Corp.*, 251 F.Supp. 286 (E.D.Pa. 1966).

6. **Slander to title:** A similar tort action is given where the defendant falsely disparages ***property rights*** in land, goods, or intangibles. This action is commonly known as one for ***"slander of title".*** See Rest. 2d, §624.

a. **Liens, mortgages and executions:** One common way of slandering title is to file a false mortgage, attachment, lis pendens, levy of execution, etc., which interferes with the plaintiff's right to hold or dispose of his property.

b. **Patents, trademarks and copyrights:** Another way of committing the tort is for the defendant to state that the plaintiff's goods infringe the defendant's patent, trademark, or copyright.

c. **Intent:** The plaintiff is required to meet the same scienter requirement as for trade libel. That is, he must prove knowing falsehood, reckless disregard of the truth, or malice.

d. **Privileges:** The defendant has defenses and privileges similar to those of trade libel.

i. **Rival claimant's privilege:** In particular, he has a conditional privilege to assert an ***inconsistent legal interest*** of his own. For instance, if he reasonably believes that he may have a right to land which is ostensibly owned by the plaintiff, he may file a lis pendens to

prevent the plaintiff from selling the land until its ownership can be adjudicated. Similarly, if he believes that he may have a valid trademark or patent infringement claim against the plaintiff, he may assert this. See Rest. 2d, §647.

ii. **Abuse:** But since the privilege is conditional, it is lost where it is ***abused.*** It is abused if it is asserted in bad faith, or out of malice toward
★ the plaintiff. For instance, in *Gudger v. Manton*, 134 P.2d 217 (Cal. 1943), the defendant filed a judgment lien against the plaintiff's real property, in an attempt to obtain satisfaction of a judgment against the plaintiff's wife. There was evidence that the defendant realized that the plaintiff's assets could not legally be seized to satisfy his wife's debt, and that the lien was used simply as a coercive measure to obtain payment. It was held that this constituted bad faith, resulting in a forfeiting of the rival claimant privilege.

C. Interference with existing contract: The tort of ***"interference with contract"*** protects the plaintiff's interest in having others perform existing contracts which they have with him. The tort claim exists against one who ***induces*** another to breach a contract with the plaintiff.

★ **Example:** P runs a theater, and has a contract with an opera singer under which she will perform for P, and will not perform for anyone else during a certain period. D induces the singer not to perform her contract with P. *Held*, P has a cause of action against D for inducing this breach. *Lumley v. Gye*, 118 Eng. Rep. 749 (Q. B. 1853).

1. **Contracts as to which inapplicable:** Certain kinds of contracts cannot serve as the basis for this "inducing of breach" cause of action.

a. **Illegal contracts:** For instance, if a contract is ***illegal*** or "contrary to public policy", the defendant may induce a breach of it with impunity. Rest. 2d, §774. This would be true, for instance, if the contract violates the antitrust laws.

b. **Contract terminable at will:** If a contract is ***terminable at will***, most courts hold that the defendant is not liable for inducing one party to
★ terminate it. For instance, in *Terry v. Dairymen's League Co-operative Ass'n*, 157 N.Y.S.2d 71 (N.Y. App. Div. 1956), the court held that inducing the termination of such a contract should be treated the same as inducing a person not to enter new business relations with the plaintiff (i.e., the tort of "interference with prospective advantage" discussed *infra*, p. 358.)Since the defendant's privilege to further his own competitive advantage is much broader in the context of this latter tort, there was no liability found in *Terry*.

i. **Restatement view:** But the Second Restatement, and a growing minority of modern courts, hold that inducing the breach of a terminable-at-will contract ***does*** constitute interference with contract. See Rest. 2d, §766, Comment g. The theory behind this view is that until

the contract has been in fact terminated, it is a valid and existing one, and the plaintiff has a right to expect that it will not be tampered with.

ii. **Damages:** However, even under this view, the fact that the contract could be terminated at any time will be a factor tending to reduce the damages that the plaintiff has suffered; for instance, if the defendant can show that the other contracting party was unhappy with the service or price he was getting, and would have terminated the contract anyway, this will reduce or eliminate the plaintiff's damages.

iii. **Privilege:** Also, if the defendant acts for reasonable competitive purposes (i.e., getting the business for himself), his conduct is very likely to be held to be ***privileged*** if the contract is terminable at will, as it would be if only the "prospective advantage" of the plaintiff had been interfered with. See Rest. 2d, §768, Comment i. But if the defendant acts for other, improper, motives (e.g., desire to drive plaintiff out of business for pure spite) his conduct will not be privileged.

c. **Unenforceable contracts:** The fact that the contract is unenforceable as between the parties to it because of the Statute of Frauds, lack of consideration, statute of limitations, or other contract defense (except illegality, discussed *supra*) will ***not*** prevent the defendant from being liable for interfering with it. Rest. 2d, §766, Comment f.

d. **Contract to marry:** A ***contract to marry*** cannot give rise to the tort. See Rest. 2d, §766. The primary rationale for this is that society has an interest in discouraging weak or unsuitable marriages.

2. **"Interference" by defendant:** The defendant is liable only if he has ***actively interfered*** with the contract.

a. **Mere offer of better price:** Thus the defendant does not become liable merely by ***offering a better price*** to the third person, or routinely soliciting his business, even if he knows that an acceptance would cause the third person to breach his contract with the plaintiff. Rest. 2d, §766, Comment m. But if the defendant says, "I'm offering you a better price than you have with P; if you take me up on it, you'll save enough that you can settle your contract with P and still come out ahead," the defendant has stepped over the line and actively induced the breach. Rest. 2d, §766, Illustr. 3.

3. **Intent:** The defendant's interference must be ***intentional***. If he has merely negligently prevented another from performing his contract with the plaintiff, the tort of interference with contract has not occurred.

★ **Example:** D Gas Co. negligently maintains liquified natural gas, which explodes and causes a major fire. The fire prevents P from working at his nearby job at X Corp. for 8 days, and P loses salary. *Held*, D is not liable, since its interference with P's employment was negligent, not intentional. If liability were allowed for negligent interference with contract, there would likely be "a mass of litigation which might . . . overwhelm the court. . . . " Only physical injury and property damage, not intangible

economic harm such as interference with contract, may be recovered for on a negligence theory. *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Oh. Ct. App. 1946).

a. **Rationale:** This rule can be seen as another instance of the general reluctance of courts to allow recovery for negligence that has caused only intangible economic harm. This tendency has also been discussed in the context of products liability (*supra*, p. 293) and misrepresentation (*supra*, p. 321). This reluctance may someday break down, as it has begun to do in these other two contexts. See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (allowing commercial fishermen to recover for loss of fishing profits due to the defendant's negligently-caused oil spill).

i. **Master's recovery for harm to servant:** The common law recognized one exception to this general requirement of intent: an employer could recover for the value of services lost due to negligent harm to his employee, at least in the case of household servants. It is not clear whether this rule survives. See P,W&S, p. 1126, note 2.

b. **Knowledge of contract required:** For the defendant to have the required intent, it must be shown that he ***knew about the contract***. Rest. 2d, §766, Comment i.

4. **Damages:** The plaintiff may recover the pecuniary loss he has sustained as a result of the interference (including the profits he would have made from the contract). Many courts also allow him to recover for ***emotional harm*** suffered.

★ For instance, in *Duff v. Engelberg*, 47 Cal. Rptr. 114 (Cal. Dist. Ct. App. 1965), plaintiffs were a black family which had contracted to buy a house in a white neighborhood. Upon proving that the defendants, their would-be neighbors, had induced the owner not to go through with the sale, the plaintiffs were allowed to recover damges for mental suffering, as well as punitive damages. See also, Rest. 2d, §774A(1)(c).

a. **Contract claim no barrier:** The fact that the plaintiff could bring a ***breach of contract suit*** against the person the defendant has induced to breach the contract, does ***not*** bar the tort claim against the defendant. Thus in *Duff*, *supra*, the plaintiffs recovered incidental expenses (as well as a decree of specific performance) against the vendor, but were still allowed to recover for mental suffering, as well as punitive damages, against the breach-inducers.

i. **No double recovery:** However, the plaintiff cannot, of course, recover the same element of damages twice. Thus in *Duff*, the incidental damages recovered from the vendor (the interest plaintiffs had to pay while waiting for their suit) could not be recovered a second time from the tort defendants.

5. **Privileges:** The defendant's interference may have been ***privileged***.

a. **Business competition:** The defendant's desire to ***obtain business*** for himself, however, is ***not*** by itself enough to make him privileged to induce a

★ breach of contract. Rest. 2d, §768(2). See, e.g., *Imperial Ice Co. v. Rossier*, 112 P.2d 631 (Cal. 1941) (D held liable for inducing X to buy ice from him and resell it, in violation of X's contract not to compete with P in selling ice.)

i. **Contract terminable at will:** One exception to this general rule, however, is that if the contract is merely terminable at will, the defendant is privileged to induce a termination of it solely for the purpose of obtaining the business for himself (assuming that the court is one which even recognizes the possibility that such an at-will contract ★ can give rise to the tort.) Rest. 2d, §768(1). See *Terry v. Dairymen's League Co-operative Ass'n, supra*, p. 355.

ii. **Improper means:** Even this limited privilege will be lost, if the defendant uses ***improper means*** (e.g., threats, violence, illegal boycotts, etc.) to induce the termination of the at-will contract. Rest. 2d, §768(1)(b), and Comment e thereto.

b. **Defendant protecting his own contract rights:** If the defendant is not trying to gain business for himself, but trying to protect his ***existing contract rights***, he will generally be privileged to induce a breach. For instance, if D has a contract to buy widgets from X, and he knows that X can't deliver unless he breaks his contract to sell the same widgets to P, D can request that X favor him (and probably even threaten to sue if he doesn't). See Prosser, pp. 944-5.

c. **Social interests:** The defendant may be privileged if he is acting not primarily in furtherance of his own interests, but for ***valuable social*** ★ interests. Thus in the classic case of *Brimelow v. Casson*, 1 Ch. 302 (Eng. 1923), the defendant labor leader was held privileged to induce various theater owners to cancel their contracts with the plaintiff troupe manager, where the wages paid by the latter to his female troupe members were so low as to force them into prostitution (including cohabitation with an "abnormal and deformed dwarf").

6. **Interference with plaintiff's own performance:** A closely related tort action exists where the defendant has interfered with the ***plaintiff's own performance*** of a contract. This can occur not only by forcing the plaintiff to breach, but also by making performance more burdensome or more expensive. Rest. 2d, §766A.

a. **Illustration:** For instance, if the defendant intentionally prevented the plaintiff's truck from delivering merchandise to a customer, or forced the truck to take an extensive detour, this would be actionable.

b. **Same rules:** In general, the same rules as to intent, damages, and privileges, apply as where a third person is induced to breach the contract with the plaintiff.

D. **Interference with prospective advantage:** Suppose that through the defendant's interference, the plaintiff loses not the benefits of an existing contract, but simply the

benefits of ***prospective, potential***, contracts or other relationships. In this situation, the plaintiff may be able to recover for the tort that is usually called ***"interference with prospective advantage"***.

1. **Same rules except for privilege:** Essentially the same rules apply to this tort as to "interference with contract", discussed *supra*. But there is one major difference: Since the plaintiff's interests have not ripened into a present, existing contract, they are somewhat less worthy of protection, and the defendant has a correspondingly greater scope of ***privilege*** to interfere.

   a. **Competition:** The most important practical consequence is that the defendant's desire to ***obtain business for himself*** will be enough to give him a privilege, where he would not be privileged to interfere with an existing contract for this purpose.

      i. **Intent to bankrupt plaintiff:** And as long as the means used are not unlawful in themselves (e.g., price fixing, attempted monopolization, etc.), the defendant may even use methods that are intended to ***drive the plaintiff out of business***. Thus where the plaintiff and the defendants were rival wholesale fish dealers, and the defendants told the plaintiff's customers that if they continued with the plaintiff, the defendants would open up a retail store, charge low prices, and drive the plaintiff's customers out of business, the plaintiff was not allowed to recover. This was so because, although the methods may have been "ruthless or unfair in a moral sense", they were not illegal (at the time).
      ★ *Katz v. Kapper*, 44 P.2d 1060 (Cal. 1935).

   b. **Pure malice:** If the plaintiff is lucky enough to be able to prove that the defendant acted not primarily to obtain economic advantage for himself, but rather, solely or primarily out of ***sheer malice***, the defendant's conduct will
   ★ not be privileged. *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909) (upholding a complaint alleging that D established a barber shop for the sole reason of driving P's barber shop out of business).

      i. **Mixed motives:** But as long as furtherance of business interests is a significant motive on the defendant's part, the fact that he also bears the plaintiff ill-will will not cause him to lose his privilege.

2. **Group boycott:** The plaintiff's potential customers may be dissuaded from doing business with him because of a ***group boycott*** conducted by the defendant. Typically, the defendants refuse to do business with these potential customers unless they shun the plaintiff; this is a called a "secondary" boycott.

   a. **Common law rule:** Most common law decisions have held that such secondary group boycotts are not privileged, and constitute interference with
   ★ prospective advantage. See, e.g., *Jackson v. Stanfield*, 36 N.E. 345 (In. 1894) (D, a lumber retailer, held liable for helping induce the suppliers of P, a cut-rate lumber wholesaler, not to sell to P anymore.) However, this area is now heavily regulated by federal and state labor laws, which in most instances will preempt any common-law tort recovery (either by allowing the boycotting activity, or by providing statutory damages for it).

3. **Honest advice:** One who gives ***honest advice*** to another against doing business with the plaintiff will not be liable for interference with prospective advantage. This is likely to be true, for instance, of advice given by a lawyer, friend, or relative. See Rest. 2d, §772.

4. **Interference with non-business expectation:** It may also tortious to interfere with the plaintiff's non-business expectations of financial gain. For instance, the defendant might be liable if he induced the plaintiff's grandfather to leave the plaintiff out of his will; see *Bohannon v. Wachovia Bank & Trust Co.*, 188 S.E. 390 (N.C. 1936).

E. Common-law trademark, copyright and unfair competition claims: Related to these general business torts are common-law claims based upon ***trademark, copyright*** and ***unfair competition.*** Although major portions of these areas are governed by explicit federal statutes (e.g. the federal Copyright Act), certain cases involving these subjects are decided on general common-law tort principles. Some examples are as follows:

★ **Example:** P publishes "Seventeen" magazine. D manufactures girdles, which it calls "Miss Seventeen". P sues for violation of the federal trademark act, and also common-law trademark violations. *Held*, even if D is not liable for federal trademark violation, it is liable for common-law trademark infringement, and unfair competition. There is a substantial danger that, in the minds of the public, D's product will be thought either to be manufactured by P, or at least to be sponsored or approved by P. *Triangle Publications Inc. v. Rohrlich*, 167 F.2d 969 (2d Cir. 1948).

★ **Example:** P is a professor of Anthropology at U.C.L.A. D, running a business called "Class Notes", publishes a set of notes containing the substance of P's lectures given at U.C.L.A. *Held*, D has infringed upon P's common-law copyright, a non-statutory form of copyright which is held by persons who have not yet published their own ideas, but who wish to prevent others from doing so. This right is not destroyed by the fact that P has delivered the lectures to students, since these constitute a limited, essentially private, audience. *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. Dist. Ct. App. 1969).

★ **Example:** P publishes a local newspaper; D operates a radio station in the same town. For its news reports, D broadcasts local items taken from P's paper. *Held*, D's conduct constitutes unfair competition with P. The two businesses are competing for the same advertising dollars, and it is unfair to permit D to profit in this competition by use of P's labor in gathering the news. This is true regardless of whether D has violated P's copyright in the items (a question which could only be determined in federal court). *Pottstown Daily News Pub. Co. v. Pottstown Broadcasting Co.*, 192 A.2d 657 (Pa. 1963).

1. **Pre-emption:** However, the plaintiff's common-law rights may in some cases be ★ ***pre-empted by federal laws*** governing the subject area. For instance, in *Sears*

Roebuck & Co. v. Stiffel Co., P held a patent on a "pole lamp", an almost exact copy of which was sold by D. The patent itself was held to be invalid for "lack of invention" (a technical patent term), but P sought a finding that D had nonetheless unfairly competed by selling an item which the public would confuse with P's own product. The Supreme Court held that federal patent law pre-empted the area, and that if the patent was invalid, a state could not award an unfair competition recovery to P arising merely out of D's copying of P's non-patentable item. (But the state could require that two otherwise indistinguishable items each be labelled, so that there would be no confusion as to source.)

IV. INTERFERENCE WITH FAMILY AND POLITICAL RELATIONS

A. Interference with family relations: A family member's interest in having the continued affections of the other members of his family is sometimes protected against outside interference by tort claims for "alienation of affections" and the like.

1. Husband and wife: A jilted ***spouse*** may, in a number of states, bring either of two tort claims against an outsider who has interfered with the marital relation:

a. Alienation of affections: Recovery for ***"alienation of affections"*** is available in some states against anyone who has caused the plaintiff's spouse to lose his or her affection for the plaintiff.

i. Not necessarily romantic rival: The defendant can, but does not necessarily have to, be a romantic rival who has lured the spouse away. The tort can also lie against a friend or relative who has convinced the spouse to leave the plaintiff. See Rest. 2d, §683.

ii. Privilege: But the defendant, particularly if he or she is a friend or relative (rather than romantic rival) may be ***privileged*** to interfere; this is the case, for instance, if the defendant acts "primarily to advance what it is reasonably believed to be the welfare of the alienated spouse". Rest. 2d, §686.

b. Criminal conversation: A personal who has ***sexual intercourse*** with one spouse may be liable to the other for ***"criminal conversation"***. Rest. 2d, §685.

i. Initiator irrelevant: At least in the Restatement's view, it is not a defense that the spouse, rather than the defendant, made the overtures that led to the act. It is also irrelevant that the spouse falsely represented that he or she was unmarried. See Rest. 2d, §685, Comment f. (But this would be a defense to the tort of "alienation of affections", since knowledge or belief that the person is married is necessary for that tort. Rest. 2d, §683, Comment i.)

c. Statutory abolition: Many states have eliminated both of these causes of action by statutes, commonly known as "Anti-Heart Balm" statutes. See, e.g., §80-c, N.Y. Civil Rights Law.

2. Parent's claim: A ***parent*** will not usually have a tort claim against one who

alienates his ***child's affections***. Rest. 2d, §699. But there are at least a couple of special situations in which a parent may sue for interference with filial relations:

a. Causing minor to leave home: He will have a claim against a person who causes his minor child to ***leave home***, or not to return home. Rest. 2d, §700.

i. Moonies: This has been the basis for a number of tort suits against Rev. Sun Yung Moon and his followers; such suits are aided by the fact that it is no defense that the defendant may have acted out of motives of kindness or affection to the child, or believed that his not returning home was in the child's best interests. Rest. 2d, §700, Comment b.

ii. One parent against other: If a child's parents are divorced, and one has been awarded sole custody, that parent may maintain an action against the other for abducting the child or otherwise inducing him to leave the former's home. Rest. 2d, §700, Comment c. But if there has been no judicial determination on custody, or an adjudication of joint custody, there can be no such suit. (*Ibid*).

iii. Marriage: One who induces a minor child to leave home in order to ***marry*** him or her is privileged, and therefore not liable. Rest. 2d, §700, Comment f.

b. Sexual intercourse with minor female: The parent has a tort claim against anyone who has ***sexual intercourse*** with the parent's minor ***daughter*** (but not son). Rest. 2d, §701. (But if the defendant is the daughter's husband, there will be no liability). (*Ibid*).

3. Alienation of parent's affection: A child will not usually be allowed to sue for ★ the alienation of a ***parent's*** affections. Thus in *Nash v. Baker*, 522 P.2d 1335 (Okla. 1974), five children were denied recovery against a wealthy widow who had lured away their father from their mother "with a finer home, sexual charms, and other inducements". See also, Rest. 2d, §702A.

4. Indirect interferences: The right of family members to recover for indirect losses through physical injury to a spouse, child, or parent, is discussed *supra*, p. 198. See also the discussion of wrongful death recovery *supra*, p. 200.

B. Interference with political and civil rights: there may be liability for interfering with the plaintiff's ***political rights*** (e.g., his right to vote), his ***civil rights*** (e.g., his right to make a public protest) or his ***public duties*** (e.g., his duty to serve on a jury). Such areas are frequently governed by statutes, which often contain explicit civil damage provisions. But even in the absence of statutory regulation, the plaintiff may be able to recover. Sometimes this is done by recognizing the concept of ***"prima facie"*** tort, i.e., a tort which does not fall into any traditional category, but which the court nonetheless feels deserves civil compensation. The New York courts, in particular, have recognized this concept. In other courts, the action is allowed by recognizing a special category of politically-related torts.

★ **Example:** D, a polling official, prevents P from casting his vote for parliament member. *Held*, P may recover civilly against D,

notwithstanding the fact that this is a political question. "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it . . . " *Ashby v. White*, 1 Eng. Rep. 417 (K.B. 1702).

★ **Example:** P, who works for D, is called for jury duty. D refuses to consent, and when he finds out that P has in fact told the jury officials that she desires to serve, fires her. *Held*, P may recover for her emotional distress at the firing. " . . . The jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected." (But the notion of "*prima facie* tort" will not be used to justify this result.) *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975).

EXAM QUESTIONS AND ANSWERS

The following questions were asked on various Harvard Law School First-Year Torts examinations in recent years. The questions are reproduced as they actually appeared, with only slight modifications. The sample answers are not "official" and represent merely one approach to handling the questions. The page references in parentheses are to the main text of the outline.

QUESTION: At points where a trail entered his property in a sparsely settled area, Farmer posted signs warning, "No trespassing. Snowmobilers and other unauthorized persons keep off. Violaters assume all risks." Boisterous intruders continued to run snowmobiles through his property at night. Farmer then erected a barbed wire barrier across the trail at each edge of his property and again about 100 yards in from each edge. He piled brush over the two barbed wire barriers at the edges of the property, but left the barbed wire uncovered at the barriers farther in. Joyce, operating a snowmobile owned by Jimmy, her passenger, maneuvered around a barrier at the edge of Farmer's property, returned to the trail, and while proceeding at high speed, crashed into one of the inner barriers. Joyce, not having her seat belt fastened, was thrown off the snowmobile into a snowbank, unhurt. The snowmobile, uncontrolled, crashed into Farmer's barn, a quarter of a mile off the trail, and started a fire. Jimmy unfastened his seat belt and dragged himself away from the fire, severely injured. Farmer rushed out to the barn and tried to control the fire. Joyce appeared, discovered Jimmy's condition, and asked Farmer to take them to the nearest hospital, 40 miles away. When Farmer refused and continued his efforts to control the fire, Joyce, threatening Farmer with a knife, took Farmer's car keys and forced Farmer to help carry Jimmy to Farmer's car. Joyce then drove Jimmy to the hospital, where Jimmy was found to be suffering from exposure as well as the injuries from the crash. Farmer returned to the barn to fight the fire, but without success.

What torts? Explain.

SAMPLE ANSWER: I will discuss the possible torts in the chronological order in which they occurred.

Trespass by Joyce and Jimmy: It seems clear that both Joyce and Jimmy have committed a trespass on Farmer's land. As trespassers, they are liable for virtually all consequences (p. 31), probably including the burning of the barn (even if this was not foreseeable, and even if it was not the result of any negligence). Even though Jimmy was not the driver, he will almost certainly be held to have actively participated in the trespass, and he will be ***jointly and severally liable*** with Joyce for the barn-burning.

However, if Farmer is found to have committed a battery, this might constitute a superseding cause relieving Joyce and Jimmy of liability.

Nuisance by Joyce and Jimmy: Farmer could sue Joyce and Jimmy on a nuisance theory, since they (in combination with other snowmobilers) substantially interfered with his use and enjoyment of his property. However, in view of his trespass claim, it is unlikely that Farmer would bother to assert the nuisance one.

Battery by Farmer: The use of the barriers by Farmer might be a ***battery*** against Jimmy and Joyce, if they can show that Farmer either intended to cause the contact with their bodies or snowmobile, or knew that such a contact was substantially certain to follow (p.6). In trying to prove this, Joyce and Jimmy will want to point to the fact that the outer barriers were covered up, which indicates that Farmer was trying to hurt snowmobilers, not merely keep them out. On the other hand, Farmer could show that the barrier that was crashed into was uncovered, and could claim that he was just trying to keep people off the trail once they got onto the property.

In any event, Farmer is certainly likely to assert that he was ***privileged*** to erect the barriers, to prevent trespass. To sustain this privilege, he will have to show that he used no greater degree of forced than seemed reasonably necessary, and that this force was ***not deadly*** (i.e., not likely to cause death or serious bodily injury). Since Farmer knew that most of the snowmobiling took place at night, on what are presumably unlit trails, the use of such barriers does seem likely to cause serious harm. If so, the case would be similar to *Katco v. Briney* (p. 62), and there would be no privilege, since Farmer's own safety, and the sanctity of his dwelling, were not in danger.

Even if Farmer succeeds in showing that the barrier should not be considered deadly force, he may lose his privilege by virtue of his failure to ***warn*** of the device's existence (p. 63).

Negligence by Farmer in erecting barrier: Even if the erection of the barrier is not a battery by Farmer, it might be ***negligence*** on his part, if it constituted a failure to use ordinary care. However, the duty of care owed by a landowner to trespassers is limited.

Jimmy and Joyce might be found to have been "constant trespassers on a limited area" (the trail), in which case Farmer would have at least a duty to warn them of dangers they were unlikely to discover for themselves (p. 174), of which the barrier is probably an instance. Alternatively, if Jimmy and Joyce are children (the question does not indicate whether they are), Farmer might have a duty of care towards them, if he knew that many of the snowmobilers typically were children (p. 176).

Even if Farmer were found to have been negligent, Jimmy might be held to have assumed the risk, or to have been contributorily negligent. These defenses are discussed in the treatment of his suit against Joyce, below.

Negligence by Joyce towards Jimmy: Joyce's conduct in driving at high speeds was probably negligent as to Jimmy. However, she will be able to assert several defenses based on his own conduct. First, he may be held to have ***assumed the risk***. Normally one assumes the risk only as to ***particular*** risks that one is aware of; however, in this instance, Jimmy might be held to have assumed the risk of unknown dangers incident to a dangerous activity like snowmobiling in the dark (p. 221). However, even if Jimmy assumed the risk of a barrier, he did not necessarily assume the risk that Joyce would drive at high speeds; this would be a question of fact, turning on whether she had driven fast on other occasions with him, giving him reason to know that she was likely to do so again.

Alternatively, Jimmy may have been ***contributorily negligent*** in riding with Joyce. Again, this is likely to turn on whether he knew that she would drive too fast, or had an opportunity to get off when he saw that this was the case.

Lastly, there may be an ***automobile guest statute*** broad enough to include snowmobiles (e.g., a statute including "all motorized recreational vehicles), which would allow Jimmy to recover only if Joyce was "grossly" or "wantonly" negligent.

Assuming that Joyce is liable for negligence, she would certainly be liable for Jimmy's injuries from the collision. She may also be liable for his ***exposure*** injuries. She will argue that the exposure injuries are the direct result of Farmer's refusal to help, which should be treated as a superseding intervening cause. However, it seems probable that

the exposure would be held to be reasonably foreseeable, even if Farmer's intransigeance was not; the case would then fall under the rule that where the harm was foreseeable, and the manner of its occurrence not, there is liability (p. 128).

Negligence by Farmer in his refusal to help Jimmy: Farmer's refusal to aid Jimmy might be negligence. The general rule is that one has no duty to rescue a stranger, even when this could be done at little danger to oneself. (p. 155). However, since Jimmy's injuries were the result of an instrument under Farmer's control, this would probably be enough to give rise to a duty on the part of Farmer to render reasonable assistance (p. 156).

But even if Farmer had such a duty to give reasonable assistance, he may have been privileged not to so do because of his right to preserve his property (by fighting the fire). This question would depend on what a reasonable man would have done in the circumstances; normally human life is considered more important than property, but since Joyce was available to take Jimmy to the hospital, Farmer may have behaved reasonably. A court might also hold that Farmer's duty of care was lessened because of the fact that Jimmy was a trespasser (although this would contradict the rule that once a landowner discovers a particular trespasser on his property, he must behave with ordinary reasonable care towards him; p. 175).

Assault by Joyce: Joyce's use of the knife to threaten Farmer is probably a prima facie case of ***assault***. Joyce's threat was a ***conditional*** one, but the general rule is that this is still an assault unless she had the legal right to make Farmer comply with the threat (by taking Jimmy to the hospital) (p. 16). She had such a right only if this fell within Farmer's duty of reasonable care, an open question as discussed above. In any case, even if she did have a legal right to compel him to take Jimmy, her use of a knife may have constituted an unreasonably violent way of accomplishing this result. (See paragraph 1(a), p. 16).

Conversion or trespass to chattels by Joyce: Joyce's use of Farmer's car to take Jimmy to the hospital may have been either conversion or trespass to chattels. It will be the latter rather than the former unless the inconvenience and harm to Farmer was substantial, which the question does not indicate it to have been.

Assuming that there was at most merely trespass to chattels, even this may fall within Joyce's privilege of ***private necessity***. This will be so if there was no more reasonable way of getting Jimmy to the hospital. (p. 70).

QUESTION: During his 63rd year, defendant D's wife died and he retired on his social security and a small pension. He moved out of the house he had lived in with his family for 35 years, into a smaller wood frame one in a residential neighborhood. About a year later, he became aware that an ailanthus tree was growing into the brick foundation. He consulted a friend who was a small time building contractor, and was told that unless he did something about the tree he would eventually have to replace that part of the foundation, at a cost of at least $5,000. He then called a local company that was in the business of pruning and removing trees. They told him that it would cost him about $500 to have the tree cut down and taken away.

$500 was his income for a month, so he decided to do the job himself. He was in good health. He owned a chain saw and some ropes, and he had often spent his lunch hour watching tree surgeons at work. The tree was about 30 feet high, but he knew that ailanthus wood is light and weak, being mainly water.

From his attic window, he tied a rope around an upper branch and then went outside and cut through about six of the 12 inches of the trunk. He pulled on the rope, in order to cause the tree to fall away from the street, along the side of his house, and into his back yard. What he didn't realize was that he had made the cut on the wrong side of the tree

(only an expert would have known this) so that, given its angle and the distribution of its foliage, the natural direction of its fall was toward the street. The tree wouldn't budge, no matter how hard he pulled on the rope, and he found himself quickly out of breath and a little dizzy. He picked up the chain saw and cut further into the trunk, until he realized that the tree had begun to fall — toward the street! He tried to push it back and over into the right direction. He would probably have succeeded had he been a vigorous young man of 20. But he was too weak, and the tree fell into the street, severing an electric power line.

The power line had been put up twenty years before the accident by the Power Company, acting under technical specifications that had been approved by the state power regulatory commission. Two years before the accident, the regulatory commission had approved the Power Company's proposal to replace all old power lines with new ones. The new model is strong enough to withstand the impact and the weight of a tree like that which D cut down. But at the time of the accident the company had fallen six months behind in the implementation of the replacement program. Had it not been for the delay, a new wire would already have been installed on D's block.

It was a Sunday afternoon, and normally there would have been little if any traffic in D's street. But it happened that P, an out of town motorist who had gotten lost, came down the street just as the tree was falling. If he had been obeying the 20 m.p.h. speed limit, instead of going 25, it wouldn't have hit him, but it did. He was very frightened but unhurt by the impact. The roof of his car was dented. He slammed on the brakes and jumped out, stepping on the live power line and electrocuting himself.

His widow sues both D and the Power Company for the damage to her husband and to the car. Assume that she has the same rights her husband would have had if he had been injured instead of killed (i.e., there is no problem about interpreting a wrongful death statute in this case). Discuss the pros and cons of the issues that will arise in the case.

SAMPLE ANSWER:

(1) P vs. D: P can pursue two general lines of attack against D: negligence and strict liability. After discussing these two, I will discuss the proximate cause issues that are common to both. (I will treat the plaintiff as being P, rather than his widow, for simplicity).

Negligence suit against D: In order to establish a negligence cause of action against D, P must first show that D bore him a duty of care. This should not be hard to do, since a landowner's duty to persons outside the premises is generally one of reasonable care, at least where an activity, rather than a natural hazard, is concerned.

Assuming that D had the duty to behave as a reasonable man would, the principle issue is whether D should be held to the standard of care of persons habitually engaged in tree surgery (i.e., ***experts***), or the standard of care of a non-expert. (Disposition of this issue is obviously critical, since by cutting on the wrong side of the tree, D violated the former standard but not the latter).

In arguing for imposition of a "reasonable expert" standard, P can point out that the whole reason most tree surgery is done by experts is that it is a dangerous activity if not done correctly, and society has a strong interest in not being forced to run the risk of bungling amateurs. A person who performed medical surgery would certainly be held to the standard of a reasonable doctor, whether he had a license to practice medicine or not; similarly, a child who engages in dangerous activities usually pursued by adults will be held to an adult standard of care (p. 83). P can make a strong argument that these principles should be extended to impose on D the standard of care which would be shown by a reasonble tree surgeon.

In response to this, D can argue that imposing a higher standard on him than that of a reasonable non-expert landowner would be grossly unfair. There was no way he himself could have met such a standard, since by definition it is one met only by experts. Nor did he behave unreasonably in not going to an expert, since to do so would have cost him a month's income, and the risk of accident did not seem to justify such a painful expenditure. Furthermore, D can contend, this situation is different from that the unlicensed person holding himself out as a doctor; D has not represented to anyone that he is an expert, and no one has relied on any indication of expertise.

Assuming that D is held to an ordinary reasonable man standard, and was therefore not negligent in the way he cut the tree, it could still be argued that he was negligent in not pushing the tree back in the right direction once it started to fall. Normally a person's physical attributes (in this case, his weakness and age) are taken into account, and not held against him, in determining what constitutes reasonable conduct. (p. 79). But the fact that D was weak, and not equipped to deal with an emergency, may be a factor indicating that it was not reasonable care on his part to start the cutting process in the first place; certain activities require an ability to react well in an emergency, and the actor will be negligent if he performs them without this capacity (e.g., a bus driver with slow reflexes; see p. 87).

Strict liability for abnormally dangerous activity: As a second line of attack, P can argue that tree surgery in this situation was an ***abnormally dangerous activity***, and that D should be strictly liable for the resulting accident. However, it is usually held that this kind of liability will apply only where the activity is such that substantial risk cannot be eliminated even by due care. Since a professional tree surgeon could probably have brought down the tree with almost no risk of this kind of accident, this condition seems not to be met; D could cite the *Beck* case (p.254), where land fills were held not to be an abnormally dangerous activity for this reason.

Proximate cause: For each of these theories, P will have to establish that D's conduct was the proximate cause of his harm. To do this, he will have to overcome a number of hurdles that D will throw in his path.

First, D will contend that damage to the power lines was not a foreseeable result of his activity. But from the sound of things, given that P was negligent (or that the activity was abnormally dangerous), the risk of damaging power lines seems to be within the "cluster" of risks that made the conduct negligent or ultrahazardous.

But even if damage to the power lines was foreseeable, and thus a proximate result of D's conduct, it doesn't follow that the damage to P's car was also foreseeable. This was a sparsely travelled street, and there was very little danger that a motorist would happen to be passing by when the tree fell. D could argue forcefully argue that P was really in a *Palsgraf*-like position, an essentially "unforeseeable plaintiff". But P could counter by arguing that the Second Restatement's test should be applied: looking back on the accident, it is not "highly extraordinary" that, given that P was on the street, his car should have been hit by the falling tree. (p. 129-30).

Even assuming that D's act was the proximate cause of the damage to the car, it does not by any means follow that D is also the proximate cause of P's death. D will start by contending that he never imposed an unreasonable risk of bodily harm on P at all, and that P is therefore certainly in a *Palsgraf* position with respect to his personal injuries, even if he was not in such a position with respect to the damage to his car. However, D will probably lose with this *Palsgraf* argument; the court is likely to hold that once P was placed in danger for his personal property from a falling tree, he thus established himself as a foreseeable plaintiff, and any other harm arising to him in the same general episode would be D's responsibility. This result could be supported by analogy to those cases allowing recovery for negligent infliction of emotional distress to a parent who sees a child harmed, and who is himself within the "zone of danger" (i.e, put in risk of bodily harm); see p. 166.

Next, D has a string of several "superseding intervening cause" arguments. First, he can try to blame the whole accident on Power Co., for having delayed in putting in a power line that would have withstood the tree. But this contention is very unlikely to succeed; Power Co.'s negligence was almost certainly not "gross", and its ordinary negligence is unlikely to be considered a superseding cause. (The most this argument will get D is joint and several liability with Power Co.)

Then, D can claim that P's travelling above the speed limit was a superseding cause (or, alternatively, contributory negligence per se). But this argument is not likely to work either. P's fast driving did not increase the danger of the accident, at least as far as anyone observing from P's position before the accident would have been able to tell. (See the discussion of *Marshall v. Nugent*, p. 131).

Lastly, D can contend that P's leaving the car and stepping on a live power line was an irrational and bizarre act which should be superseding (or, alternatively, that it was contributory negligence). He could point to Illustration 2, §445 of the Second Restatement, which indicates that where a passenger, after being frightened by a near collision, panics, opens the door, and throws out her child, this is a superseding act for which the person who has caused the near-miss is not responsible. (See p. 135). But D ought to be able to distinguish this example fairly easily, by stating that he merely got out of the car as a reasonable person would have, and didn't notice the power line. In any event, this was an emergency of sorts, and D should only have to live up to the standards of a reasonable man in such an emergency (p. 85), which he probably did.

All in all, unless D succeeds in showing that he should be held to the standard of care of a reasonable non-expert, not a reasonable tree-surgeon, he is likely to be held liable for both the damage to the car and P's death.

(2) P vs. Power Co.: P may proceed against Power Co. under either a negligence or a strict products liability theory. And there is a remote possibility that he might succeed on a "strict liability for abnormally dangerous activities" theory.

Negligence: In order to establish that Power Co. was negligent, and that this negligence was a proximate cause of his damages, P will have many hurdles to overcome.

First, Power Co. will argue that the regulatory commission's approval of the technical specifications conclusively established that its conduct met the standard of reasonable care. While such compliance will probably not be conclusive on this issue, in the same way that a statutory violation would conclusively establish "negligence per se", the court might consider this compliance as ***evidence*** that Power Co. met reasonable standards of care. (p. 104). But it would do even this only on a showing that these technical specifications were drafted after consideration of safety needs imposed by possible storms, rotten trees, etc.

Even if Power Co.'s conduct was reasonably careful twenty years ago, however, this does not mean that it did not later become negligent by not replacing the power line. As stronger materials became available, the durability of the minimum reasonable installation surely increased; the question then becomes whether there is an obligation to go to the expense of substituting the newly-available materials. This question has probably been answered affirmatively in highway design cases, in which states have been held to be under an obligation to use newly-developed safe-design knowledge to remodel old roads now known to be unduly dangerous.

Even if Power. Co.'s delayed installation of the new lines would not otherwise be negligence, it may have become "negligence per se" once the plan was approved by the regulatory commission, and then not followed. (This assumes that the commission approved not only the overall plan, but also the timetable, which was not met). Power Co. could counter this negligence per se argument by contending that its new program went far beyond the requirements of reasonable care, and that it should not be penalized for

adopting an ambitious plan. Also, the court might hold that an administrative body's determination should not be accorded the same deference as the legislature's safety statutes; see p. 97.

Proximate cause: To show that Power Co.'s negligence (if established) was the proximate cause of the damage to the car, it will not be necessary for P to show that this particular accident (i.e., bad tree surgery) was reasonably foreseeable. The risk that trees might fall for other reasons (e.g., storms), was itself substantial, and this accident would probably be held to be an illustration of the principle that where a foreseeable kind of harm occurs in an unforeseeable manner, there will be liability. See, for instance, *Gibson v. Garcia*, p. 137, in which the defendant was held liable for a negligently maintained wooden pole next to the street, where it was knocked over by an unforeseeable car accident.

Power Co.'s next line of defense would be that even if it was negligent with respect to damage to the car, it was not negligent with respect to danger of electrocution. But again, danger of some sort of electrocution was probably one of the risks that made the conduct negligent in the first place, so the fact that this may have occurred in an unforeseeable manner (i.e., panic as the result of being hit by a tree) would not be enough to be a superseding cause.

Power Co. could try to blame the whole thing on D's negligence, arguing that his negligence contributed so much more directly to the accident that he should be the only one to be liable. But since Power Co.'s negligence was clearly a "but for" cause of the accident, and otherwise appears to have been a proximate cause of it, D's own negligence (surely not "gross" negligence) is unlikely to get it off the hook. The best that Power Co. can hope for from this argument is the right to ***contribution*** from D, according to an estimate of their relative degrees of fault; see the discussion of *Dole v. Dow Chemical*, p. 152.

Lastly, Power Co. can, like D, argue that P's speeding was the superseding cause, since he wouldn't have been electrocuted if he had been within the speed limit (since he wouldn't have been hit by the tree, and therefore not have gotten out of the car). But this argument is no more likely to succeed for Power Co. than for D; P's speeding did not increase the perceivable risk of the electrocution, so it will not even be contributory negligence, let alone a superseding cause.

Strict products liability: P might try to argue that the Power Co. line was a "defective" product, and that Power Co. should have strict tort liability for it.

Normally, some kind of sale, rental or other transfer has been necessary for strict products liability. Here, since Power Co. has simply put up the power line for its own purposes, such a transaction seems to be missing. But D can argue that Power Co. was supplying a service (electricity) and should have strict liability for any physical product used in supplying that service. (He could analogize to *Newmark v. Gimbel's*, the beauty shop case, p. 290). Then, the argument would continue, Power Co. would be liable to P as a "bystander", just as a car maker would be liable to a pedestrian injured by a defective car.

But even if a court were willing to extend strict products liability to this considerable extent, this probably wouldn't get P too far. He would still have to show that the product was "defective", and to do so, he would probably have to make the same kind of showing that the benefits of the new, stronger, lines outweighed their costs, that he would have to make in a negligence action. He might draw some support from the recent California case, *Barker v. Lull Engineering* (p. 278, footnote), holding that a design is defective if it doesn't meet a reasonable consumer's expectations as to safety; he might be able to show that the average driver or homeowner reasonably believed that a power line would withstand having a fairly light tree fall on it, or that it would go dead once severed.

Abnormally dangerous activity: Lastly, there is a very small chance that D might be able to establish that weak power lines constituted an abnormally dangerous activity,

giving rise to strict liability. P could point to the *Lubin v. Iowa City* case (p. 253), holding that a town which buries water mains and intentionally leaves them there till they start leaking has such strict liability. However, this case seems to be distinguishable on the grounds that it involved a danger which was almost certain to materialize, whereas the power lines were not at all certain to be hit by a falling tree.

QUESTION: In the early 1970's the Dow Drug Company developed a compound called XYZ, which its researchers hoped would prove effective in treating certain unusual blood diseases. By 1974, after experimentation with almost a thousand human subjects, the drug was approved by government authorities for distribution to only a few specially qualified physicians, who would themselves inject it into patients. Dr. Mary Jones, a specialist in blood diseases who practices in Ames City, is qualified to administer the drug. She became fully apprised of the drug's potentialities and side effects through the instructions sent to physicians by Dow with the drug. The instructions noted that short-term adverse side-effects were judged to be relatively slight — nausea, light-headedness, and blurring of vision, all normally expected to pass within five to ten hours after the drug was injected. The blurring of sight was related by experimenters to very slight hemorrhaging of the retina, and there was thought to be a theoretical possibility (not realized with any experimental subject) of more serious hemorrhaging and eye damage, particularly after repeated injections. Also, a handful of the experimental subjects reported continued nausea lasting on and off over a period of months, even from a single injection.

Early in 1975 Fred Smith, a 32-year-old construction worker, was referred to Dr. Jones by his family physician. Smith was afflicted with Price's syndrome, a rare condition of the blood for which no recognized treatment was available. Smith complained of characteristic symptoms of the Syndrome: a constant dull aching throughout his body and phases of debilitating listlessness which interfered with his work so much that he feared he might be fired.

After a thorough examination, Dr. Jones explained that there was no recognized treatment for his illness but added that a new drug just on the market might conceivably prove to be the answer, though no one could tell for sure. Smith, stating that he didn't want to spend the rest of his life feeling poorly and uncertain about employment, concluded that if the doctor thought this drug might work, he would try it. Dr. Jones replied that "on balance" she thought it worthwhile to go ahead. She injected Smith with the recommended dose of XYZ. Dr. Jones then said that, though the side-effects of the drug were apparently limited to "some mild discomfort that passes in a matter of hours," the drug still was "experimental", and therefore they should monitor its effects closely. Smith agreed to come back for a check-up the following week.

That night Smith was troubled by nausea, but he felt fine the next morning as he set out in his car to drive to the construction site where he worked. While on a little-travelled three-lane highway, Smith rounded a curve and saw that his lane was blocked by a stopped car about 50 yards ahead.

The car belonged to Elmer Brown, a senior official of the Ames City Health Department. Brown was to deliver the main address in one hour at a special state-wide meeting of health officers called to discuss the grave public health problems caused by recent heavy rains and flooding. His car's right rear tire had blown out. Brown's travelling companion had advised Brown to pull off the road before trying to change the tire, but Brown had rejoined that the side of the road was so muddy that they would probably get stuck there. As Smith approached, Brown was working furiously to change the tire, knowing that his chances of arriving on time for his lecture were decreasing.

When Smith saw the Brown car he maintained his speed but started to pull out into the middle lane to pass. There was no on-coming traffic. But at that moment Smith suddenly

suffered serious retinal hemorrhaging and near total loss of vision. He hit the brakes but couldn't control direction or avoid a glancing collision with Brown's car.

Both cars were damaged in the collision, and both Smith and Brown were hospitalized with fractures. Tests showed that Smith's impairment of vision was irreversible.

Discuss the tort actions that Smith and Brown might bring. The State of Ames, where the relevant events occurred, is a common-law jurisdiction with respect to auto accidents; the Ames courts follow the rule of "pure" (not "partial") comparative negligence.

SAMPLE ANSWER:

Smith v. Dow Drug: Smith can bring a ***products liability*** claim against Dow Drug. Unless he can prove negligence in the testing procedures, he will have to proceed on either a strict liability or implied warranty cause of action. Because of possible privity problems with a warranty claim, this strict tort liability claim looks like his best bet, and this is what I will consider.

Smith will have to demonstrate that the product was ***"defective"***. Dow will undoubtedly argue that even if the product was dangerous, it was ***"unavoidably dangerous"***, since extensive experimentation failed to disclose the danger. The question is really whether the product's safety should be judged as of the state of medical knowledge at the time it was given to Dr. Jones, or as of the time of trial. (p. 273). Most courts would probably hold that the former is the time for evaluating the danger, and that the product was therefore unavoidably unsafe.

Dow can also point out that it was not engaged in mass distribution of the drug, but merely a new level of carefully supervised experimental testing. Particularly since this testing stage was approved by the government, Dow can make a powerful claim that it should not be held liable; otherwise, it would be impossible to test a drug sufficiently to market it. On the effect of government approval of the drug, Dow could point to *Lewis v. Baker* (p. 274), holding that once a drug is properly tested and approved by the FDA, it was as a matter of law not defective.

Warning: Smith can also contend that even if the product was otherwise unavoidably unsafe, Dow at least bore the duty of giving an adequate warning of possible bad side effects. It is usually held that a drug manufacturer has no duty to warn of bad side effects of which it is unaware at the time of sale (pp. 283-4). But since Dow was aware of at least the theoretical possibility of retinal hemorraghing, it might well be held that it had a duty to warn of this possibility. (I am assuming that severe retinal hemorrhaging was not mentioned to Dr. Jones as a possibility, although the question is unclear on this issue).

Smith may also contend that it was not enough that the warning was transmitted to Dr. Jones, and that Dow had an obligation to see that the patient himself received the warning. However, this argument is unlikely to prevail; it is usually held that a warning to the dispensing doctor is sufficient. (See, e.g, *Hines v. St. Joseph's Hospital*, p. 275).

If Smith does make out his prima facie case that the product was defective, he will probably also be able to establish that the defect was a proximate cause of both his impairment of vision and the accident. As to the latter, even if the danger of severe hemorraghing was only theoretical, there was a well-established danger of blurring vision; the accident would then fall within the principle that where the harm is foreseeable, but occurs in an unforeseeable manner, it is a proximate result. (See p.128). It is possible, however, that the court will apply a narrower standard of proximate cause in a case based upon strict liability than in the usual negligence case.

Smith v. Dr. Jones: Smith has two theoretical causes of action against Dr. Jones, one for products liability and the other for malpractice.

He is unlikely to be successful on his products liability claim. Such liability has almost never been imposed on ***professionals*** who supply a product in the course of rendering a service. See, e.g., the *Magrine* case, p. 290.

Smith has a much stronger case against Dr. Jones for ***malpractice*** (i.e., professional negligence). Jones does not seem to have acted negligently in recommending the drug's use, since Smith appears to be the sort of candidate for whom its use was indicated. However, Smith has an excellent chance of showing that his ***informed consent*** was not obtained.

Prior to the injection, Smith was not informed of any of the possible side effects. Assuming that Dr. Jones was aware only of the minor side effects, and not of the possibility of severe hemorrhaging, she might be able to persuade the court that these side effects were so minor that a reasonable person in Smith's position would have taken the drug even had he known of them, and that they were therefore not material considerations required for informed consent. On the other hand, Jones' statement that "on balance" she thought the drug would be worthwhile seems to indicate that she did not regard these side effects as all that trivial, and should therefore have told Smith about them.

Assuming that Jones did not know about the risk of severe hemorrhaging, it seems very unlikely that communication of that risk to Smith was necessary for his informed consent. Informed consent is generally a matter of professional standards, and a professional could hardly be expected to warn of risks that he was not aware of. (Informed consent is not yet a matter of strict liability). If my assumption that Jones did not know of the theorectical danger of severe hemorraghing is incorrect, then it seems highly likely that she failed to gain Smith's informed consent. This would seem to be so even though the danger was only "theoretical", since a person in Smith's position, suffering a non-fatal disorder, might well decline to take the drug on account of this danger.

It may also have been negligent of Dr. Jones not to warn of the danger of on-and-off nausea for several months. Again, this is a factor that might well have been material to one in Smith's position. It seems probable that even though this particular risk never materialized in his case, its omission from Jones' description of the drug should be held against her for purposes of determining whether she was negligent. The question ought to be whether, taking all the undisclosed risks together, Smith was given enough information to make a reasonable choice.

If Dr. Jones is found to have been negligent in not obtaining Smith's informed consent, the court will then have to decide whether this negligence was the proximate cause of either the hemorrhaging or the auto accident. It seems likely that it will be a proximate cause of at least the hemorrhaging, since this was one of the risks (although theoretical) the non-disclosure of which was negligent. If this is so, then the car accident also ought to be a proximate result, since it is highly foreseeable that one who suffers a hemorrhage will do so while driving and get into an accident. Furthermore, since there was a danger of blurred vision anyway, the accident would, as noted, fall within the "foreseeable harm but unforeseeable manner" principle, as it would in Smith's case against Dow.

Brown v. Smith: Brown can try to maintain an ordinary negligence action against Smith. His biggest problem will be in showing that Smith was negligent, since there is no indication that Smith had any knowledge of the danger to his vision. Nor is there any indication that Smith was negligent in maintaining his speed when he moved to pass.

If Brown does somehow establish Smith's negligence, he would still be faced with a potent contributory negligence defense by Smith. Brown might be able to combat this by showing that it would have been unreasonable for him to have tried to change the tire at the side of the road, and risk getting stuck, particularly in view of the extreme social

importance of his being on time for his speech. (In general, the value of the interest being pursued by the plaintiff will be taken into account in determining whether he was contributorily negligent.)

If there is found to have been contributory negligence, Brown's recovery will be reduced by the proportion which his negligence bears to the combined negligence of Smith and himself. If the jurisdiction is one in which ***last clear chance*** is still allowed as a defense despite comparative negligence (p. 217), Brown might have a chance at having this doctrine applied. However, it doesn't seem that Smith, suffering as he was from a hemorrhage, really had a last clear chance to avoid the accident (unless the doctrine of "antecedent last clear chance" were applied, based on the fact that Smith's high speed was what deprived him of the chance to stop; p. 213).

Brown v. Dow Drug: Brown might bring a strict tort liability claim against Dow. He would have to make the same showing as to defectiveness and lack of warning as Smith would. Beyond that, he would have to convince the court to extend the strict tort doctrine to cover him as a bystander. Most jurisdictions have been willing to make such an extension, particularly where the bystander is a pedestrian or motorist injured in a car accident. (However, most such cases have involved defective automobiles, where the risk of bystander injuries is probably greater than it is from a defective drug). The proximate cause issue is likely to be resolved the same way as in Smith's suit against Dow for his fracture and the damage to his car.

Brown v. Dr. Jones: If Brown brought a negligence action against Dr. Jones, he would have to establish negligence on the same informed consent basis as would Smith. His biggest obstacle, however, would be in establishing that Dr. Jones bore him a ***duty of care***. A court might well hold that even assuming that there was a significant enough danger of hemorrhaging that Jones should have warned Smith of this, the danger to a passing motorist is slimmer, and the motorist might be in a *Palsgraf* position. On the other hand, Brown can point out the fact there was also a danger of an accident occurring through temporarily blurred vision, and that he was a foreseeable victim of such an accident.

Even apart from this, there remains the broader question of whether a doctor should ever be liable for injuries to third persons arising from side effects of a drug (whether or not there was informed consent). Suppose that Dr. Jones had made all required disclosure, and Smith elected to go ahead with the use of the drug; it would certainly seem highly unfair to hold Jones liable for Brown's injuries in this event. The old *Palsgraf* question arises again: why should Brown be able to take advantage of Jones' negligence (lack of informed consent) vis a vis Smith? On balance, it seems unlikely that a court would hold Dr. Jones liable here.

QUESTION: Prime Textiles Corporation purchased a 30-year-old building in an industrial section of Amesville in late 1969 and converted its interior to a plant for the manufacture of brightly colored fabrics to be sold to dress manufacturers. Prime has been a successful innovator in designs and even in a year of recession shows a handsome profit. Its sales are at an annual rate of about $3,500,000 and it employs 400 workers and technicians at this, its only plant.

In early 1970, Dead-em Insecticides, Inc., constructed for $2,250,000 a plant in the same industrial section of Amesville, five blocks (1/4 mile) distant from Prime. It employs 200 workers and technicians. Dead-em is a leading producer of insecticides for houehold use — bees, roaches, etc. In 1973 it developed a new and commercially successful product, Strike, that has proved to be remarkably effective while meeting all safety requirements. The new process of manufacture necessarily involves the emission of gases and other by-products different in chemical composition from the by-products of the manufacture of the earlier type of insecticides.

By mid-1974, Prime began to receive complaints from its vendees that the colors on about 1/2 of its fabrics were not proving "true" or "fast". They faded after several months, and some took on a different tint. After investigation, Prime determined that the recent gaseous emissions from Dead-em had permeated its building and adversely affected certain of the dyes that it used for coloring fabrics.

Prime has retained your firm to advise it of what recourse it has against Dead-em. Your preliminary inquiry reveals the following additional information. (1) No other industrial producer in this section of Amesville has been adversely affected by these emissions. (2) The alternatives open to Prime, if it has no recourse against Dead-em, are to abandon a profitable and important part of its production involving certain standard, adversely affected dyes; to remove at great and perhaps prohibitive expense to another location; or to renovate its building (doors, windows, year-round air conditioning) to exclude the interfering gases. This last alternative would cost about $300,000, a serious expenditure that, in a competitive industry, would sharply reduce profits. (3) Prime's 1974 loss of profits (on many warranty claims from its vendees and then reduced sales) is estimated at $90,000.

The senior partner in your firm requests a memorandum outlining (a) the possible legal recourse against Dead-em, (b) your analysis of the difficulties in litigation and assessment of the chances of success, and (c) your recommendation of how Prime should proceed. No recent decision of the Supreme Court of Ames addresses this type of problem.

SAMPLE ANSWER: Prime can proceed on either a trespass or a nuisance theory. On either of these theories, it can attempt to get compensatory damages for past and/or future harm, as well as an injunction against future wrongdoing by Dead-em.

Trespass: Prime should first try to show that the permeation of its plants by the Dead-em gases constituted a trepass. Until fairly recently, courts refused to recognize that gases and fine particles could constitute a trespassory invasion, and required a suit based on nuisance. But a number of courts now permit a trespass suit in this situation. For instance, in *Martin v. Reynolds Metals*, (p. 33), a suit in trespass was allowed where gases and particles from an aluminum reducing plant ruined the plaintiff's farmland.

To maintain a trespass action, Prime will have to show that the gaseous invasion was "intentional". It will not have to show that Dead-em intended or knew that ***damage to the dyes*** would result, but it does have to show that Dead-em knew that the gases would enter the plant (i.e., that the trespassory contact was intentional). This may be difficult (at least prior to Prime's giving notice to Dead-em of the problem), since the 2 plants are some distance apart.

If the court accepts the argument that there has been a trespass, we should have no problem getting compensatory damages for the lost profits in 1974. Prime may also be able to get an injunction against future trespasses of this nature. It would have to show that permanent compensatory damages (i.e., an estimate of the harm caused in the future) would not be an adequate remedy. If the court is disinclined to give an injunction, there is a good chance that we could get it to award the $300,000 required to gas-proof the plant.

Nuisance: If we fail to sustain the trespass theory (e.g., because the court won't recognize gases as trespassory), we will have to resort to a nuisance theory. We can certainly satisfy the basic requirement, a showing that Prime's use and enjoyment of its property has been substantially impaired.

We will also have to show that Dead-em's interference with Prime was either intentional, negligent, or abnormally dangerous. At at some point after Prime discovered the damage, I assume that it made a complaint to Dead-em. As to any damage occurring after this time, we would almost certainly be able to show that the nuisance should be

treated as "intentional", since Dead-em knew that the gaseous invasion was occurring. But prior to our giving notice, I think we will have trouble showing that there was either negligence, intent or abnormal danger. We may simply have to write off the $90,000 1974 loss.

We face several additional hurdles in trying to get prospective damages or an injunction on a nuisance theory. First, Dead-em is almost certain to argue that Prime's manufacturing process constitutes an ***"abnormally sensitive activity"***, and that it should not be liable for this. Dead-em could cite *Rodgers v. Elliott*, (p. 302), where a plaintiff who was sent into convulsions by the defendant's church bell was not allowed to recover for nuisance due to his abnormal sensitivity. On the other hand, what constitutes "abnormal" is determined in part by the plaintiff's location; since Prime is located in an industrial area, surely a suitable place in which to run a manufacturing and dying plant, its use might not be held to be abnormally sensitive.

An additional requirement that Prime will have to meet is a showing that Dead-em's interference was "unreasonable". Dead-em will be able to show not only that its plant employs a lot of people, and represents a large investment, but also that there is a substantial social good resulting from its product (i.e., freedom from bugs with safety).

Until recently, many courts would have simply determined whether the harm to Prime was greater or less than the social utility of Dead-em's product, and if the former was less than the latter, would have refused damages. Now, however, there is an increasing tendency to hold that even if the defendant's conduct has benefits outweighing the detriments to the plaintiff, the defendant must still pay for the harm he causes. This is the view of the Second Restatement (p. 304). We would still have to show that requiring Dead-em to pay permanent compensatory damages (probably the $300,000 required for gas-proofing) would not put it out of business, but I think we can make this showing.

I don't think we have much of a chance of getting an injunction on a nuisance theory. Here, the court will definitely balance the benefits of Dead-em's product against the harm to us, and I don't think we'll come out ahead. Even though we employ more people than Dead-em, the fact remains that we could keep the same employment merely by investing $300,000, whereas Dead-em would probably be put out of business, or at least have to slash a good portion of its working force (as well as giving up a socially useful product) if the injunction were granted. The court is likely to point to *Boomer v. Atlantic Cement* (p. 306) as authority for denying a permanent injunction.

Final recommendations: In summary, we might as well try both trespass and nuisance theories. We should try to develop facts which will push back as far as possible the date on which Dead-em knew or should have known of the invasion of the plant by its emissions, so that we will be able to get recovery for the 1974 lost profits. We should probably not devote too much of our resources to trying to get an injunction, since this seems futile; instead, we should try to recover the $300,000 it would take to gas-proof Prime.

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SUPPLEMENT

1982–83

This supplement contains principal cases appearing in the Seventh Edition (1982) of Prosser, Wade & Schwartz, *Cases and Materials on Torts,* and not appearing in the Sixth Edition (1976).

Insert on p. 9, Par. A(1)

Intent: The intent to make contact, not the intent to do injury, is the essential intent element in an action for battery. Thus ***playing a joke*** on another which involves offensive contact does not relieve the defendant from liability for battery.

Example: P is unloading a shipment of beef. Suddenly and without warning, a meat inspector for the United States Department of Agriculture jumps on his back screaming "boo", pulls P's hat over his eyes and begins riding him piggyback. Consequently, P falls forward and strikes his face on some meat hooks.

Held, since the meat inspector's actions were not accidental and he intended to make contact, he committed a battery, even though he was only engaging in horseplay, and did not think P would be hurt. (Therefore, D, the U.S. Government, is not liable, since the waiver of sovereign immunity which is given by the Federal Tort Claims Act does not apply to battery claims.) *Lambertson v. United States*, 528 F.2d 441 (2d Cir. 1976).

Insert on p. 18, Par. F(1)

Fear of losing one's job: If the plaintiff voluntarily submits to commands that are strictly verbal, unaccompanied by force or threats, there is no false imprisonment. Similarly, plaintiff's subjective fear of ***losing his job*** will generally not be sufficient to render his consent to confinement involuntary.

For instance, in *Faniel v. Chesapeake and Potomac Telephone Co. of Maryland*, 404 A.2d 147 (D.C. Cir. 1979), P worked for the American Telephone and Telegraph Company's Maryland subsidiary. She was accused of maintaining an unauthorized telephone in her home, and did not object when told that she was required to accompany AT&T security officials to her home to recover the equipment; she "just assumed that [she] had to go." Plaintiff was then driven to her house; she claimed that this car ride constituted false imprisonment. Appellant was not threatened with force, loss of job, or

prosecution (and in fact none of these occurred). Nor did P at any point object or attempt to leave the car. The court held that P's subjective fears of being fired or prosecuted, and her belief that she had no choice but to go on the trip, were not sufficient to make her confinement involuntary. (But the result might have been different if the AT&T officials had in fact threatened to have her fired if she refused to accompany them.)

Insert on p. 20, Par. (a)(i)

Defense of valid arrest: If a party asserting legal authority has the right to make an arrest, then this will serve as a defense to a false imprisonment claim. But the arrest must, to constitute a defense, be for the offense that the arresting officer says it is for, not for some other offense.

Example: D, a policeman, suspects P of violating a municipal ordinance against letting dogs run without leashes. He asks P, who is sitting in her parked car, for her driver's license. She refuses (but tells him her name and address), and he tells her that she must produce the license or go to jail. She refuses again, and he arrests her. *Held*, P was falsely imprisoned. No statute requires a citizen to produce her driver's license upon demand (except when she is driving and the demand relates to her car or driving conduct). Nor can the "leash" law furnish a defense, because it is clear that D arrested P for failing to produce her license, not for violating the leash law. *Enright v. Groves*, 560 P.2d 851 (Colo. Ct. App. 1977).

Insert on p. 21, Par. H

Awareness of False Imprisonment: As noted in the text, a party must be ***aware*** of his confinement while he is experiencing it in order to recover for false imprisonment. But awareness at the time of confinement, ***not*** necessarily the ability to ***remember*** the confinement, is all that is required.

Example: P is picked up by the police of D city in a drunken conditon. Rather than arrest him, they drive him out of town to an abandoned golf course and leave him there to "sleep it off". *Held*, for P. He would not be entitled to recover if he had not been aware of the confinement at the time it took place. But while P no longer had any recollection of his confinement (due either to the alcohol he had imbibed or the injuries he had suffered), he certainly had been ***conscious of it at the time when it was actually taking place***. P's responsiveness to police commands, his conversation in the car and his request to be let off elsewhere illustrate such consciousness. *Parvi v. City of Kingston*, 362 N.E.2d 960 (N.Y. 1977).

Insert on p. 26, Par. D(1), following first Example

Example 2: D, who is P's supervisor on an automobile assembly line, is aware that P suffers from a speech impediment which causes him to stutter. During a five-month period, D verbally and physically mimicks P over thirty times, and as a result, P is "shaken up" and feels "like going into a hole and hide [sic]." P has been under the care of a doctor for a nervous condition for six years prior to this period. In a suit against D for intentional infliction of emotional distress, P testifies that his nervousness and speech impediment worsened as the result of D's conduct.

Held, for D. While D's conduct was intentional and/or reckless, the emotional distress suffered by P was not sufficiently severe to allow him to recover. P saw his doctor only once and received the same treatment he had been receiving for six years prior to D's actions. Being "shaken up" and wanting to "climb into a hole" do not by themselves indicate a sufficiently strong or lasting emotional reaction to D's taunts. *Harris v. Jones*, 380 A.2d 611 (Md. 1977).

Insert on p. 50, Par. E

Professional athlete's consent: Participating in a usually-violent ***professional sport***, like football or hockey, is no longer generally considered to constitute consent to all injuries which may be inflicted by an adversary. Instead, there is an increasing tendency to hold that a player who intentionally attacks or injures his opponent may be liable in tort (or even subjected to criminal prosecution.) See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), where "Booby" Clark, a player for the Bengals, hit P on the back of the head and neck with his forearm, knocking him to the ground. (Clark claimed that he was frustrated by the fact that his team was losing.) The court held that P could bring a tort suit. The rules of pro football expressly prohibit "striking on the head, face or neck with . . . the hand . . . [or] forearm. . . . " Therefore, it could not be said that the generally violent nature of the game, and the fact that fouls are often overlooked, meant that P had no remedy except retaliation.

Insert on p. 83, Par. (d)

Abnormally dangerous activity: An exception to the special rules for children is usually made where the child engages in a dangerous activity that is normally pursued by adults. In such a case, the child is held to the standard of care that a ***reasonable adult*** engaging in that activity would exercise. The operation of a ***snowmobile*** was held to subject the child to an adult standard of care in *Robinson v. Lindsay*, 598 P.2d 392 (Wash. 1979). The court in *Robinson* held that whether the activity is normally engaged in by adults (the test applied by most courts) was ***irrelevant***, and that the sole issue should be whether the activity is "abnormally dangerous" (which the court found snowmobiling to be.)

Insert on p. 92, after Par. 6

Objective standard for professional: The standard of care for one who engages in a business, occupation or profession is ***objective*** not subjective. Thus the defendant's own training and experience are irrelevant in determining whether he behaved with due care (at least where he does not hold himself out as a specialist); the issue is whether the defendant matched the standard of care commonly found among other members of the same profession.

Example: D, a professional pilot, is piloting a small plane when it crashes shortly after takeoff, killing P. *Held* (on appeal), the trial judge was wrong to instruct the jury that negligence should be measured by reference to the care and skill of an ordinary prudent pilot "having the same training and experience as [D]." Instead, an objective standard, the "minimum standard generally

applicable to all pilots", should have been applied. *Heath v. Swift Wings, Inc.*, 252 S.E.2d 256 (N.C. Ct. App. 1979).

Insert on p. 93, Par. (a)

Reasonable disclosure standard: The ***scope of disclosure*** must be measured by the patient's need to know enough to enable him to make an intelligent choice, ***not*** by reference to the disclosure practices of doctors in the community. Full disclosure of all ***material risks*** incident to treatment must be made; a risk is material if it would be likely to affect the patient's decision.

A related question is what standard the trier of fact should use in determining whether the patient would indeed probably have declined the treatment had full disclosure been made. (This issue is significant with respect to causation, since if the patient would have undergone the treatment even had full disclosure of the risks been made, the lack of informed consent is not a proximate cause of the injury.)

In *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979), the court held that what counts is what the patient himself would have done (whether a reasonable response or not), not what some hypothetical "reasonable patient" would have done had full disclosure been made. Other cases have applied a "reasonable patient" standard to this issue. But observe that even under the *Scott* standard, the jury does not necessarily have to take P's word that he would not have undergone the treatment; the jury may always choose to conclude that P's testimony is not credible.

Insert on p. 94, Par. 2

Guest statute held unconstitutional: The Supreme Court of South Carolina recently declared that the state's **Automobile Guest Statute** violated the Equal Protection Clause of the U.S. and South Carolina Constitutions. The argument that protection of "hospitality" requires such a statute was rejected on the grounds that compulsory liability insurance for drivers removes the need for protecting hospitality in such situations. Similarly, the argument that guest statutes are needed to prevent collusive lawsuits was rejected on the theory that such statutes bar far more valid lawsuits than collusive ones, and are therefore over-inclusive. *Ramey v. Ramey*, 253 S.E.2d 883 (S.C. 1979).

Insert on p. 100, following Example

Excusable violation: For a second case holding, as did *Davison v. Williams*, that a statute requiring effective brakes requires merely "***reasonable prudence***" in maintaining the brakes, see *Freund v. DeBuse*, 506 P.2d 491 (Or. 1972).

Insert on p. 101, Par. (iv)

Greater risk of harm: Michigan has joined the increasingly large group of states which treat violation of a statute as simply creating a *prima facie case* of negligence, which may be ***rebutted*** by a showing that the violation was excusable. *Zeni v. Anderson*, 243 N.W.2d 270 (Mich. 1976). One of the factors

which may make noncompliance excusable (and the factor which existed in *Zeni*) is that it would have been ***more dangerous to comply with than to violate*** the statute. Thus in *Zeni*, P, a pedestrian, declined to walk on a snow-covered sidewalk, and instead used a portion of the street through which pedestrians had a beaten path. D, who collided with her, claimed that P was contributorily negligent *per se*, since she violated a state statute requiring that sidewalks be used where they are provided. The court permitted P to overcome the presumption of her contributory negligence by evidence showing that people had fallen on the unshoveled sidewalk, which was thus more dangerous than the street at that time.

Insert on p. 119, Par. 3

Multiple fault: The "double fault and alternative liability" theory has occasionally been extended to situations involving ***three*** or more parties. Thus if the plaintiff cannot prove which of three or more persons caused his injury, but can show that all were negligent (or produced a defective product), the court may cast upon each defendant the burden of proving that he did not cause the injury.

This is especially likely to occur in cases of ***products liability***, where the plaintiff was injured by his long-ago usage of a product which he can identify only by type, not brand name. If a given member of the class of defendants is unable to prove that he did ***not*** cause the injury, the court may well require him to pay that percentage of the plaintiff's injuries which the defendant's sales of the product bore to the total market sales of that type of product.

Example: At least 200 manufacturers use an identical formula to produce DES, a synthetic estrogen. P alleges that her mother took the drug during pregnancy, and that it has caused P to develop cancer. P is unable to show which manufacturer of DES produced the drug that P's mother took. However, she sues 5 drug companies, who she asserts manufactured 90 percent of the DES ever marketed. *Held*, P need not identify the single manufacturer of the drug that her mother used, since this would be impossible to do. The "joint action" rationale of *Summers v. Tice*, p. 119-20 main text, is not applicable, since it cannot be said with certainty that one of the 5 D's produced the dosages taken by P's mother. However, the unavailability of proof is not at all P's fault, and is partially attributable to the fact that the D's produced a drug whose bad effects were not visible for many years.

Furthermore, "[f]rom a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product" since they can discover and guard against defects, and warn of harmful effects. Thus the rule here will give the D's an incentive to make their products safe.

Each defendant is free to show (but has the burden of proving) that it could not have produced the particular dosages consumed by P's mother. Any defendant who cannot make such a showing will be liable for the proportion of any judgment represented by that defendant's share of the overall DES market. *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980).

Alternate "enterprise liability" theory: Several other courts, confronted with multiple-defendant suits like that in *Sindell*, have imposed liability by

using what is sometimes called the theory of "***enterprise liability***". As the theory goes, the multiple defendants have engaged in some sort of industry-wide cooperation (e.g., delegating to an industry trade association the authority to promulgate labelling or product-safety standards.) By this cooperation, the defendants may be said to have "jointly controlled the risk", so that it is not unreasonable to hold each member of the industry liable. See, e.g., *Bichler v. Eli Lilly & Co.*, 436 N.Y.S.2d 625 (App. Div. 1981), aff'd 55 N.Y.2d 571(1982), finding that the multiple defendants in a different DES case had, although acting independently, nevertheless engaged in a "concert of action."

Insert on p. 132, Par. 4

Foreseeable negligence of third parties: Where the risk that makes the defendant's conduct negligent is the risk that ***third persons*** will in turn behave negligently, the fact that a third person does in fact behave negligently will generally ***not*** be a superseding intervening cause, particularly if the third-party negligence is of the sort that should have been foreseen by the defendant.

Example: D1 is in the process of installing a gas main. P is an employee of a subcontractor. D2, who knows that he has epilepsy, suffers an epileptic seizure and crashes into the worksite with his automobile. P is thrown into the air and when he lands, is splattered with 400-degree boiling hot liquid enamel from a kettle struck by the car. D1 negligently failed to make the worksite safe by not erecting a barrier around the excavation. Such a barrier would have protected the workers from oncoming traffic. Nevertheless, D1 argues that D2's particular negligence (not taking his medicine and having a seizure) was a freak accident, and was therefore superseding.

Held, for P. D2's negligence did not interrupt the causal link between D1's negligence and P's injuries. A "foreseeable, normal and natural result of the risk created by [D1] was the injury of a worker by a car entering the improperly protected work area." The precise way in which the car entered the worksite was immaterial -- "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent."

Also, the alleged contributory negligence of P in placing the kettle on the west side of the excavation (and increasing the chance of injury) was not a superseding cause as a matter of law. The injury could have occurred in many ways; the fact that D1 could not foresee the precise manner of the accident or nature of the injury was immaterial. (New York was a pure comparative negligence state at the time of the suit, so P's negligence, if it existed, would not have barred recovery under traditional contributory negligence doctrines.) *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. 1981).

Note: *Derdiarian* makes an important more general point: merely because the precise way in which injury occurs could not have been foreseen does not make the injury-causing event a superseding cause, if the ***general*** way in which the injury occurred was foreseeable.

Insert on p. 143, Par. (2)

Similar liability for both joint and concurrent tortfeasors: As discussed in the main text, concurrent tortfeasors are those whose ***independent*** acts concurred to proximately cause the injury (main text, p. 118), while joint tortfeasors have acted in concert. However, regardless of whether the defendants are concurrent, or joint, tortfeasors, if the harm is ***indivisible***, ***each defendant*** is liable for the entire harm.

Example: P is electrocuted when the boom of the truck he is working on touches a high-energy power line. P sues D1, owner of the truck, and D2, the manufacturer of the boom. *Held*, although D1 and D2 were concurrent, not joint tortfeasors, P can recover the entire amount of damages from either of them, since the harm (P's death) is indivisible. Regardless of whether a party is a joint or concurrent tortfeasor, if he is a ***proximate cause*** of an ***indivisible harm*** he is liable for the ***entire injury***. This rule assures that the injured party is fully compensated. *Seattle First Nat'l Bank v. Shoreline Concrete Co.* 588 P.2d 1308 (Wash. 1978).

Insert on p. 151 Par. 2

Indemnity for retailer not automatic: Traditionally, a manufacturer of a defective product must indemnify a retailer who incurs liability for selling it. However, in *Tolbert v. Gerber Indus., Inc.* 255 N.W.2d 362 (Minn. 1977), the court held that as between the manufacturer and the installer of defective equipment, each bears the costs of compensating the injured party in ***proportion*** to their comparative culpability in causing the injury.

The court in *Tolbert* analogized the indemnity situation to comparative negligence (which had been adopted in Minnesota.)

Insert on p. 157, Par. 3

Assumption of duty: Once a party voluntarily begins to render assistance to another, he must proceed with ***reasonable care***. This duty includes the obligation not to leave the person aided in a worse position than he was in before, in addition to the duty not to restore him to the former risk after temporarily making him safer. For example, in *Parvi v. City of Kingston*, (*supra* [this Supp.], p. 1) policemen held P in their custody for being intoxicated. After he was dropped off on an abandoned golf course to "sleep it off", P wandered onto the New York State Thruway 350 feet away, where he was severely injured.

The court held that the jury could reasonably have found that it was foreseeable that P would wander onto the highway and be injured, and that it could reasonably have concluded that P was in at least as great danger on the golf course as he was when the police found him. Therefore, the jury's finding of liability was not error. (Also, P's voluntary drunkenness was not an intervening superseding cause, since to treat it as such would negate the entire principle that one who aids the helpless must not worsen their conditon.)

Insert on p. 163, Par. 1

Exception to modern development: Not all courts have done away with the

privity requirement with respect to persons who supply services. Concerning attorneys, for instance, this relaxation of the strict privity requirement generally occurs only when the plaintiff is the ***intended beneficiary*** of the contract by which the lawyer is hired (e.g., actions brought by intended legatee for mis-drafted wills, or by land purchasers for erroneous title reports prepared under contract to the seller).

Example: The Ps twice are high bidders at a foreclosure sale. However, both times they fail to obtain title because the Ds, who are the attorneys conducting the sale, fail to follow standard procedure, so that the debtor is permitted to redeem the property. The Ps sue the Ds to recover their lost profit on the sale, and allege that the Ds owed them a duty to conduct the sale with proper care.

Held, for the Ds. Third parties may recover for negligence against attorneys with whom they do not have contracts only if they are, in effect, creditor beneficiaries, i.e., persons for whose benefit the contract was made (e.g., intended beneficiaries under a will). Here, the Ds were retained by the mortgagee (the original creditor), who did not intend to benefit purchasers at the foreclosure sale (and who, on the contrary, intended to extract the highest price possible from such purchasers, clearly directly at odds with the interests of the purchasers.) *Clagett v. Dacy*, 420 A.2d 1285 (Md. 1980).

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Insert on p. 165, Par. (b)

Exception: The "telegraph company" exception, imposing liability for pure emotional suffering for negligent transmission of messages announcing death, has been broadened by New York's highest court to include a hospital's negligent misstatement to a patient's relative that the patient had died. In *Johnson v. State*, 334 N.E.2d 590 (N.Y. 1975), the hospital pulled the wrong patient record, and therefore told P that her mother had died, when in fact another patient with the same name had passed away. The hospital was held liable for P's emotional suffering, even though she did not suffer any physical injury. The rationale for the expansion of the exception was that the psychological trauma suffered here was not easily counterfeited or trivial.

Note: Under a *Palsgraf* test, the claimant's funeral expenditures and the serious psychological damage caused by the false message were both within the "orbit of the danger" presented by the misstatement. These damages were therefore also within the "orbit of the duty" owed by the hospital, for the breach of which it could be held liable.

Insert on p. 169, Par. (c)

Congenital defect: In *Berman v. Allan*, 404 A.2d (N.J. 1979), the Supreme Court of New Jersey upheld in part an earlier ruling (*Gleitman v. Cosgrove*, p. 169, main text) insofar as it refused a "***wrongful life***" recovery for a child afflicted with Down's Syndrome. The child's mother had not been warned by her doctor of the dangers of having a child at the age of 38, nor of the availability of amniocentesis. Had D properly informed the mother (the mother argued), the child would have been aborted and would not now be undergoing lifelong physical and emotional pain and suffering. The court reasoned that this kind of

"wrongful life" recovery amounted to saying that it is better not to be born at all than to be born handicapped, and held that courts cannot make such an anti-life statement.

However, the court ***recognized the parents' claim*** for ***"wrongful birth"***. In the 12 years since *Gleitman, Roe v. Wade* had established a woman's constitutional right to an abortion in these circumstances, so that D deprived the mother of a constitutional right, which deprivation should be compensible in tort.

With respect to the measure of damages, however, the court allowed only a recovery for the parents' emotional suffering, not for the medical and other expenses required to treat, raise and educate the child. Recovery of the expenses was denied on the theory that it would allow the parents to "retain all the benefits inhering in the birth of the child — i.e., the love and joy they will experience as parents — while saddling defendants with the enormous expenses attendant upon her rearing . . . [a result] wholly disproportionate to the culpability involved. . . . "

Note: Allowing the parents to recover for emotional suffering parallels the judicial trend towards allowing recovery for purely emotional harm without physical injury.

Insert on p. 171, Par. (a)

Trees: The rigid ***rural/urban*** distinction in fallen-tree cases was rejected in *Taylor v. Olsen*, 578 P.2d 779 (Or. 1978), in favor of a general requirement that the landowner exercise ***"reasonable care to prevent an unreasonable risk of harm"***. In *Taylor*, P was hurt when her car hit a tree, which had fallen onto the highway from D's land. D was in the logging business, and had recently cut down half of the trees on the land, but left standing the tree in question. The tree's center turned out to be decayed, but this decay did not extend through the bark. The court suggested that D, since he was actively involved in logging the land, could be found by the jury to have had a duty to make a reasonable inspection of the trees (even though this was more or less rural terrain.) But, since no evidence was presented to show that a reasonable inspection would have included cutting through the bark (the only way to discover this particular defect), the trial court was correct in directing a verdict for the defendant.

Insert on p. 178, Par. B

Fraternal organization: A visit by one member of a ***fraternal organization*** (a Masonic Lodge) to another was held to make the visitor merely a licensee, even though the visitor came in part for the purpose of paying his Lodge dues. *Barmore v. Elmore*, 403 N.E.2d 1355 (Ill. App. Ct. 1980). In *Barmore*, the visitor, P, was attacked with a steak knife by D's mentally-ill son. P was found to be essentially a social guest, since payment of the Lodge dues was primarily for the benefit of the organization, not for D's benefit. Since P was a licensee, D had no duty to use reasonable care to keep the premises safe for P, but merely a duty to warn P of dangers ***known*** to D. Here, the evidence was overwhelming that, despite two or three violent acts ten years previously, D had no knowledge that his son was likely to be violent at that time, either towards P or anyone else.

Insert on p. 180, Par. B(2)

Modern view of who is invitee: As an example of the modern view that all members of the public who come onto land held open to the public are invitees, see *Home Ins. Co. v. Spears*, 590 S.W.2d 71 (Ark. Ct. App. 1979). Here, the Ps went onto a bridge owned by the D county, and fell off while sitting on or leaning against the side rails in order to watch some pollution tests. The court held that the Ps were invitees, to whom a general duty of care was owed to make the premises safe.

Insert on p. 189, Par. 8, following Example

General negligence standard for lessors: Wisconsin has followed the approach of *Sargent v. Ross*, in applying ***general negligence principles*** to lessors. *Pagelsdorf v. Safeco Ins. Co. of America*, 284 N.W.2d 55 (Wis. 1979). In *Pagelsdorf*, P, who was assisting D's tenant, was hurt when he leaned against a dry-rotted balcony railing which collapsed. D was held to an ordinary care standard towards his tenant and others on the premises with permission. Since modern social conditions no longer supported special exceptions for landowners, there was logically no basis for a general rule of non-liability for landlords. "It would be anomalous indeed to require a landlord to keep his premises in good repair as an implied condition of the lease [see Emanuel on *Property*], yet immunize him from liability for injuries resulting from his failure to do so."

Insert on p. 197, Par. A(1)

Recklessness standard for punitive damages: Where defendant's conduct is outrageous, or the defendant acts in willful, wanton and/or malicious disregard of the rights of another, punitive damages are often awarded. The rationale for such an award is to punish past conduct and to deter future wrongdoings. Courts now allow such awards in ***products liability*** suits. See, e.g., *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980). There, highly flammable cotton "flannelette" pajamas made by D caught fire, severely injuring four-year old P. The appellate court upheld a $1,000,000 punitive damage award, on the grounds that D created a substantial danger to the public by marketing its highly flammable product, that D knew of the danger and of economically feasible ways of reducing it but continued to make the product without using these available safety measures, and that D reaped substantial profits from selling the product.

Note: The *Gryc* court also rejected Judge Friendly's argument in *Roginsky v. Richardson Merrell, Inc.* (main text, p. 198), that awards of punitive damages in multiple-plaintiff situations might so weaken the defendant economically that later plaintiffs might be unable to recover even compensatory damages. The court responded that the trial court in *Gyrc* had instructed the jury to consider this danger, and that his instruction, not a total ban on punitive damages, was all that was needed to solve the problem.

Insert on p. 226, Par. (iii)

Comparative negligence jurisdiction abolishes assumption of risk: Still another comparative-negligence jurisdiction, Florida, has abolished the affirmative defense of implied secondary assumption of risk and merged it into the defense of contributory negligence. *Blackburn v. Dorta*, 348 So.2d 287 (Fla. 1977). The net result of the court's action is that if the plaintiff's conduct in placing himself in the danger is unreasonable, this will be regular contributory negligence (which will reduce but not bar his recovery). If, by contrast, his conduct in exposing himself to the danger is reasonable (e.g., he is rescuing his child from a burning building), the conduct is simply not negligent, and the recovery is not reduced.

Insert on p. 230, Par. (c)

"Reasonable parent" standard: Since applying the numerous exceptions to the parental immunity doctrine (see main text, p. 230) proved to be very difficult, the Minnesota Supreme Court eliminated the immunity, in *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980). The court reasoned that the exceptions presented a "real danger of arbitrary line drawing".

Instead, the court held, areas of parental authority and discretion can be protected by using a ***"reasonable parent" standard*** for imposing liability. The test of a parent's conduct should be: "What would an ordinarily reasonable and prudent parent have done in similar circumstances?"

Insert on p. 239, Par. 1

Test for distinguishing employee from independent contractor: The "control" required to make a person an employee rather than an independent contractor is usually held to be control over the ***physical details*** of the work. It is not enough that the employer exercises control over the general manner in which the work is carried out.

Example: P claims that D1, a newspaper carrier, assaulted him when the two had an argument about delivery of P's morning newspaper. P sues D1 and D2, the publisher of the newspaper; he asserts that D1 was D2's employee.

Held, D1 was an independent contractor of D2, not an employee. It is true that the newspaper controlled the territorial boundaries of D1's route, set the time by which paper deliveries had to be completed, and handled complaints about delivery. But D2 never in fact met D1 or even knew that he had been hired (since the hiring was done by another newspaper carrier who was himself an independent contractor). The newspaper's rules on how the deliveries were to be done did not rise to the "level of supervision, dominion, and control" over D1's daily activities necessary to make him an employee. *Murrell v. Goertz*, 597 P.2d 1223 (Okla. Ct. App. 1979).

Insert on p. 255, after Par. 2(a)

Use and storage of explosives: A party who uses or stores ***explosives*** is generally held strictly liable for any damages that may result.

Example: D stores 80,000 lbs. of explosives in a building in the suburbs of Anchorage. The building is more than half a mile from the nearest building not used for storing explosives. Thieves break into the building, and set off an explosion, causing property damages within a two-mile radius and beyond, including damages to P's property.

Held, D is strictly liable for the damage caused. Storage of explosives, like use of them in blasting operations, should be subject to a *per se* rule of strict liability, regardless of whether the place of storage was geographically appropriate, or any other factor. *Yukon Equipment, Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206 (Alaska 1978).

Note: The court in *Yukon* expressly rejected the Second Restatement's six-factor balancing test (§ 520, discussed on p. 254, main text). Instead, as noted, the court applied a *per se* rule for explosive-storage cases.

The court also briefly addressed an interesting additional issue: was the act of the thieves, in breaking into the storage place and setting off the explosives, a superseding intervening cause, that would relieve D of liability? The court found that the building had been illegally broken into at least six times, usually involving the theft of explosives. Since D had knowledge of these break-ins, this particular break-in and detonation (which apparently occurred in order to cover up a prior theft) was not superseding.

Crop dusting: Strict liability is generally imposed for damage caused by ***crop dusting*** or ***spraying***.

Example: P is an organic farmer who relies on natural fertilizers and pest control agents. D, a crop duster, is spraying the land adjoining P's. During one spraying pass, D begins spraying while over P's property. This renders P unable to sell his crops to buyers of organic food.

Held, D is strictly liable for the damages that were proximately caused by his aerial spraying. Since D profits from the application of pesticide, while P suffers from its use, there is an "equitable balance of social interests" only if D pays for the consequences of his acts. *Langan v. Valicopters, Inc.* 567 P.2d 218 (Wash. 1977).

Note: Observe that the *Langan* court did not consider whether it made a difference that P, because of his specialization in the organic food business, was ***abnormally sensitive*** to D's conduct. Contrast this with *Foster v. Preston Mill Co.*, (p. 256 main text), where the plaintiff's abnormal sensitivity deprived him of recovery.

Insert on p. 278, Par. B

Alternative design must be practical: As noted in the text (p. 278), the defectiveness of a design is usually judged by comparing it to other possible designs. However, the plaintiff must show that the alternative design is not only safer, but ***practicable***. Thus in *Wilson v. Piper Aircraft Corp.* 579 P.2d (Or. 1978), the plaintiffs were the widows of two passengers who died in a plane crash. They sued the plane manufacturer, contending that the crash was caused

by carburetor icing, and that this icing would have been eliminated by use of a fuel-injected, rather than carbureted engine.

The court held that the plaintiffs, in order to succeed with this argument, had the burden of proving both that : (1) the fuel-injected design was safer; and (2) that design was ***practicable***, in terms of cost and the overall design and operation of the product. This latter factor, since it involves a cost/benefit analysis, is similar to the negligence standard.

The court observed, in a footnote, that some products might be of such ***limited utility*** that, even though no safer design is practical, the product is unreasonably dangerous, and therefore gives rise to strict liability. But an airplane, clearly, was not a product of such limited utility, so only practicable alternative designs could be considered on the "unreasonably dangerous" issue.

Insert on p. 280, Par. 4

Evidence of "state of the art" when sold: When the plaintiff introduces evidence that a particular safety device exists at the time of trial, the defendant may introduce rebuttal evidence that the device was not commercially available when the product was sold and was therefore probably not a viable design option at that time.

Example: P is thrown into the water when his boat strikes a partially submerged tree stump. With its motor still running, the boat turns and circles back toward P, killing P with its propeller. P's survivors allege that the boat was defectively designed because its engine did not have a "kill-switch" which would have automatically stopped it when P was thrown from the boat.

Held, the "state of the art" existing at the time of manufacture or sale is at least one factor to be considered in determining whether a product was defectively designed. D was entitled to present evidence that even though "kill switches" were theoretically usable when the product was sold (and had come into widespread use by the time of trial), they were not commercially available when the boat was sold. Such evidence is not ***dispositive*** in a strict liability case, since a product might be unreasonably dangerous even though no safer way to make it was yet in general use at the time of sale (e.g., the entire industry that made it simply refused to spend the reasonable sums needed to implement a known invention); but the evidence is nonetheless admissible as one item for the jury to consider in its determination of whether the product was "unreasonably dangerous" at the time it was made or sold.

A dissent suggested that only the feasibility of a safety device, not its actual commercial usage, should be relevant in products-liability defective-design cases. *Boatland of Houston v. Bailey*, 609 S.W.2d 743 (Tex. 1980).

Insert on p. 292, Par. 2

Defective semen cause only economic loss: The distinction between a defect which causes true property damage (in which case there can be strict liability) and one which causes merely economic harm (in which case there generally cannot), was decisive in *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242 (5th Cir. 1980).

In *Two Rivers*, P was a cattle-breeding company, which purchased from D semen for Chianina Cattle. The semen turned out to have a recessive genetic defect known as syndactylism, which caused some of the resulting calves to be stillborn with the defect, and which (P claimed) caused the rest of the resulting calves to have a lower market value. P sued D on both strict liability and implied warranty theories.

The court held that there could be no strict liability recovery, because P's losses were essentially economic, not property damage. The essence of P's claim was that, as a purchaser of bull semen, its commercial expectations were not fulfilled by the product. Thus the general principles of contract law (i.e., the UCC's warranty provisions), not the strict liability principles of tort law, should control. (Also, the court noted, even if the semen was considered to be defective, it was not "unreasonably dangerous.")

P also lost on its implied warranty claim, because D's written materials contained a valid disclaimer of warranties. Even though a middleman bought the semen from D and resold it to P without showing P the disclaimer, the disclaimer was valid because (the court found) the middleman was acting primarily as P's agent.

A dissent would have allowed a strict liability recovery for the loss of the four calves stillborn due to the defective semen, and for the loss in value of the other calves born from the semen (and, presumably, invisibly carrying the recessive trait for the defect).

Insert on p. 295, Par. (e)

California adopts comparative negligence for products liability: The California Supreme Court in *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978) extended the principles of comparative negligence (and, necessarily, the doctrine of contributory negligence) to strict liability actions. The court asserted that comparative negligence will not frustrate the court's goals in adopting strict liability for products liability actions. First, the court stated, plaintiffs will be relieved of proving that the manufacturer or distributor was negligent. The defendant will continue to be strictly liable for injuries caused by a defective product; however, the plaintiff's recovery will be reduced to the extent that his lack of reasonable care caused the injury. Second, the court claimed, the application of comparative negligence principles will not reduce a manufacturer's incentive to produce safe products, since there is no way a manufacturer can predict, in a particular case, that a potential plaintiff will be contributorily negligent. Finally, the court was not persuaded by the argument that jurors would be unable to make a fair apportionment of liability because they could not compare a plaintiff's negligence with a defendant's strict liability.

In addition, the court abolished the separate defense of ***assumption of risk*** in strict liability actions to the extent that it is a form of contributory negligence.

Insert on p. 299, Par. 2

Must injure the public at large: To establish public nuisance, it is not enough

that the plaintiff himself was injured, even if this occurred while he was in a public area. Instead, plaintiff must show that there has been actual injury, or the possibility of injury, to the ***public at large***. See *Mandell v. Pivnick*, 125 A.2d 175 (Conn. Super. Ct. 1956), holding that such an allegation of general public danger is necessary before a claim for public nuisance arising out of a defectively installed awning may be sustained.

Insert on p. 300, Par. A(3)

Need not be crime: Traditionally, it was generally held that for conduct to be actionable as a public nuisance, it must also be a ***crime***. See P,W&S, p. 851. But the Second Restatement (in § 821B) and most modern decisions no longer impose such a requirement (although the fact that conduct ***is*** a crime will make it more likely to be held a public nuisance.) Thus in *Tennessee ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), the court held that the handling of poisonous snakes as part of a religious ritual was a common-law public nuisance, regardless of whether it was also in violation of any state statute. (The court also held that the sect members could be enjoined from committing a nuisance that was, in effect, against themselves — "The state has a right to protect a person from himself and to demand that he protect his own life.")

Insert on p. 302, Par. C

No general "strict liability" in nuisance: The point that there is no general rule of "strict liability" in nuisance cases, and that the plaintiff must show that the defendant's conduct was either intentional, negligent or abnormally dangerous, was stressed in *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 362 N.E.2d 968 (N.Y. 1977). There, D was charged with spewing pollutants into the air, which damaged cars being processed and stored by P's company. The court held that unless D's conduct was shown to be intentional (in the sense that D intentionally injured P's enjoyment of his property, or knew that the injury was substantially certain to result), or was negligent in causing that injury, D would not be liable. (There was no claim that D's conduct was abnormally dangerous.)

Insert on p. 313, Par. (b)

Restatement view applied: The Restatement rule on the right of third persons to recover for fraudulent representations made to some other person was applied in *Varwig v. Anderson-Behel Porsche/Audi, Inc.*, 141 Cal. Rptr. 539, (Ct. App. 1977). Pennell bought a Chevrolet on credit from a dealer in Las Vegas. In California, Pennell sold the car to D1, who sold it to D2, who sold it to P. The Las Vegas dealer subsequently rightfully repossessed the Chevrolet. P then sued D1 and D2 for misrepresentation of title. D1 argued that it should not be a party to the suit because it neither had contact with nor made representations to P concerning the automobile. However, the court, relying on the Restatement rule, held that one who makes a misrepresentation that he would have reason to expect would be relied on by a particular class of people, may be liable for fraud to any class member who in fact justifiably relied on the misrepresentation. Here, D1 knew that D2 would resell the car (since D2 said that it was a

wholesaler, and furnished a resale certificate to avoid sales tax); therefore, any purchase from D2 was within the class to whom the misrepresentation of title would be repeated.

Insert on p. 314, Par. 1(a)

Independent investigation does not prevent justifiable reliance: As noted in the main text, the fact that the plaintiff investigated the defendant's statement and thought it was truthful doesn't negate the plaintiff's justifiable reliance, if the misrepresentation remained a (though not the sole) factor in inducing the reliance.

Example: The Ps, prospective home purchasers, inspect a house owned by the Ds, and notice stains on the ceiling and floor. They ask about possible leaks, but the Ds (through the real estate agent) respond that the roof had been repaired. The Ps inspect the roof, find no problems, and buy the house. They suffer substantial damage from roof leakage after moving in, and sue the Ds for fraud. *Held*, for the Ps. The Ps' inspection doesn't preclude recovery, because the defects could only have been disclosed by tearing away the roof. Since there was no reason to disbelieve the Ds' statement that the roof had been fixed, the Ps' partial investigation did not negate their justifiable reliance on the Ds' statement. *Sippy v. Cristick*, 609 P.2d 204 (Kan. Ct. App. 1980).

Insert on p. 323, Par. 1(a)

Broad view of "limited group": Restatement 2d, § 552(2), as noted in the main text, makes the defendant liable to a "limited group of persons" whom a defendant in a misrepresentation suit either intended to reach with the information, or knew that the recipient intended to reach. This "limited group" provision was given a fairly broad reading in *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976).

There, D, an accounting firm, was hired by American Allied, an insurance company, to bring its books up to date. Many of the entries on D's work papers, were erroneous because it negligently failed to investigate certain fraudulent transactions. Relying on D's work papers, the State Insurance Commissioner believed that American Allied was solvent when it was actually insolvent, and thus allowed the company to continue its operations. P, an insurance agent who wrote much of his business through American Allied, heard rumors of the company's insolvency, but continued writing policies with the company upon the Commissioner's assurance that the company was financially sound. When American Allied collapsed, P sued D for damages to his business reputation.

The court held that D was aware that its representations (the work papers), when made to the Commissioner, would be passed on to individuals who dealt with the company. P was not just a member of the public who happened to rely on the information from the Commissioner; he was one of only two general agents for Allied, and his reliance on the Commissioner's assurances was both foreseeable and reasonable. Therefore, he was permitted to recover. (The court observed that no other known cases had imposed liability for accountants' work papers, as distinguished from ultimate financial statements; however, this case

was unusual in that the work papers themselves were shown to third parties who foreseeably relied upon them.)

Insert on p. 329, Par. E

Reference to plaintiff need not be by name: If a non-explicit reference to the plaintiff is reasonably understood as in fact referring to him, it is not important that the plaintiff is referred to by a different name or characterization.

Example: P conducts "nude marathons" in group therapy, as a means of helping people to shed their psychological inhibitions. After taking the nude-therapy program, D writes a novel entitled *Touching*, with a principal character, called Dr. Simon Herford, who uses the nude therapy technique. Claiming he was defamed by the depiction in the novel, P sues the author and publisher. D argues that P is not identifiable as Herford. *Held*, for P. The only differences between P and Herford are in physical appearance and in occupation (Herford is a psychiatrist while P is a psychologist). Thus, anyone who knew P could reasonably identify him as the fictional character. Also, it is irrelevant that the book was labeled as a "novel". The test is whether a reasonable person reading the book would understand that the fictional character described is the plaintiff. *Bindrim v. Mitchell*, 155 Cal. Rptr. 29 (Ct. App. 1979).

Insert on p. 331, Par. G(1)

Statement of opinion in labor dispute: The principle that a pure statement of opinion cannot be defamatory was applied in *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425 (Cal. 1976), a case involving a labor dispute. In *Gregory*, the leaders of a union sued the employer for publishing statements which alleged that the union leaders were placing their own "political aspirations and personal ambitions" ahead of the interests of the union members. The court held that, as a matter of First Amendment law, a defamatory statement must contain a false statement of fact, not just an opinion. The statements here were found to be mere opinion. The court noted that courts should be especially reluctant to find defamation in a labor dispute, where "the judgment, loyalties and subjective motives of rivals are [typically] reciprocally attacked and defended. . . . " Furthermore, the court observed that the protection given to statements of opinion also applies to opinions about the ***motives*** of others (so long as no allegation of crime or dishonesty is made.)

Insert on p. 343, Par. 5(a)

Malice standard not extended to all reports of judicial proceedings: Under *New York Times v. Sullivan*, a "public figure" may sue only if he can show that the defendant acted with "actual malice" (i.e., knowledge of the statement's falsity, or reckless disregard of whether it was true.) The Supreme Court rejected an argument that this "actual malice" requirement should be extended to all reports of judicial proceedings, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Instead, "actual malice" will only be required where the report involves a public figure. Thus where the report and the proceeding involve a

private figure, the *Gertz* standard (requiring only that strict liability not be permitted, and that punitive damages not be allowed on a mere showing of negligence) is the sole applicable constitutional principle.

In *Time*, *Time Magazine* published a report that P's husband had been granted a divorce based on adultery. In fact, the divorce court's decree rejected evidence of adultery on both sides, and granted the divorce on other grounds. The Supreme Court rejected several *Time* defenses, including the contentions that: (1) since the public was interested in the divorce proceeding (insofar as P and her husband were wealthy socialites), P was a "public figure"; and (2) the requirement of "actual malice", imposed in *New York Times*, should be automatically extended to all reports of judicial proceedings. As to (1), legal proceedings do not automatically act to make the litigants into public figures. Here, for instance, P had no choice but to go to court if she wished to pursue her quest for a separation and for maintenance payments; thus she did not voluntarily thrust herself into the limelight. Similarly, with respect to (2), "There appears little reason why [private] individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom." Instead, the right to comment ***accurately*** on judicial proceedings (which is given by *Cox Broadcasting Co. v. Cohn*, p. 347, main text) is sufficient to protect the news media's First Amendment rights.

In a surprisingly restrictive view of the press' rights, the Court also held in *Time* that where the meaning of the judicial proceeding or decree being reported upon is ***ambiguous***, the media do ***not have the right to choose any plausible interpretation***; instead, their interpretation must be either a factually correct statement of the proceeding or decree, or must have been made non-negligently.

P did not, however, score a complete victory in *Time*. Citing the *Gertz* requirement that liability not be imposed even in a case involving a private figure unless the defendant is shown to have been ***at fault***, the Court remanded the case for a determination of whether *Time* was indeed at fault. The Court observed that the trial judge or appellate court, not necessarily the jury, could make a determination of fault; however, the Court found that in this case, neither the jury, the trial judge nor the appellate courts had consciously made a factual determination as to *Time's* culpability.

Three Justices dissented. Justice Brennan did so on the theory that the *New York Times* "actual malice" requirement should apply to all reports of judicial proceedings, even where a private individual is involved; Justice Marshall argued that P was a public figure. Justice White dissented on the completely opposite ground that P should have won a total victory, because the Florida Supreme Court made a "conscious determination" that *Time* was negligent.

Insert on p. 348, Par. F

Constitutionally-based privacy actions restricted: The Supreme Court has substantially restricted the possibilities for bringing suits based upon a

"constitutional right of privacy". As the result of *Paul v. Davis*, 424 U.S. 693 (1976), even action which would constitute defamation under local state law does not give rise to a federal-court constitutional invasion-of-privacy claim where that conduct is by government officials.

Thus in *Paul* itself, local police distributed to merchants a flyer characterizing P as a shoplifter. P was ultimately acquitted of shoplifting charges, and sued the police chief in federal court, seeking to recover under a federal statute (42 U.S.C.A. § 1983), which allows recovery for the deprivation, under color of state law, of any constitutional right. P claimed that his Fourteenth Amendment right to due process had been infringed.

The Court rejected this claim, on the grounds that the Fourteenth Amendment protects only interests in "liberty" and "property", and that one's interest in one's reputation is not an interest in either "liberty" or "property". The Court conceded that certain types of governmental action constitute invasions of the "right of privacy", but held that stigmatization of an individual, even if this would be a tort under state law, was not such an invasion.

A dissent (by Justices Brennan, Marshall and, in part, White) contended that an individual's interest in his reputation, at least where what is at stake is an allegation of criminal conduct, is a liberty interest which, if violated by government officials, gives rise to a federal cause of action.

Note: Some commentators have explained the majority view in *Paul* as being due to a fear of "constitutionalizing" the entire area of tort law, in all situations where the defendant is the government or a government employee.

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